MISSISSIPPI LAW JOURNAL

ARTICLES

SYMPOSIUM ON CONSTITUTIONAL REVISION IN MISSISSIPPI

THE REVISED MODEL BUSINESS CORPORATION ACT AND CORPORATE LAW REFORM IN MISSISSIPPI: PART ONE

VOLUME 56 APRIL 1986 NUMBER 1

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Symposium on Constitutional Revision in Mississippi

FOREWORD

The process of revising the state's constitution requires both political astuteness and enlightened choices. Revision based on political choices alone will produce a document which is narrow in scope and which serves special interests. Infusion of, and reliance upon scholarly research will enable those involved in the revision process to make informed decisions and to produce a document that addresses both the needs of our generation and those of future generations of Mississippians as well. The *Mississippi Law Journal* offers this symposium on constitutional revision not just to the legal and academic communities, but also to the three branches of state government and to all residents of the state. The symposium is a collection of articles written by people from the legal and academic communities of Mississippi and contains a history of the 1890 constitution, provides comparative analysis of state and federal models, examines the 1890 constitution in light of federal and state court decisions, and discusses the merits of various ways to revise the constitution. It is our hope that this symposium will be a valuable resource to everyone involved and will be a catalyst for informed public debate. In the end, as Hamilton predicted of the federal Constitution, " 'T is time only that can mature and perfect so compound a system, can liquidate the meaning of all the parts, and can adjust them to each other in a harmonious and consistent whole."†

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†*The Federalist* No. 82, at 553 (A. Hamilton)(J. Cooke ed. 1961).

MISSISSIPPI'S FOUR CONSTITUTIONS

*David G. Sansing**

Since its admission to statehood on December 10, 1817, Mississippi has been governed by four constitutions. On the eve of the bicentennial of America's Federal Constitution, there is increasing public support for a new state constitution. Like other southern states, Mississippi has undergone enormous political, social, cultural, racial, and economic changes since the mid-1960s.[1] Most southern state constitutions were simply superseded by those sweeping changes. Ten of the eleven states of the old Confederacy, with Mississippi as the only exception, have modernized their constitutions either by elected conventions or appointed commissions during the last twenty years.[2]

Mississippi's existing constitution was drafted by a convention and adopted by the legislature in 1890.[3] Controversial from the outset, the constitution was condemned by the two rival political factions, subjected to misconstruction by lawyers and judges, and misunderstood by the plain people of Mississippi. Among the most stirring and eloquent indictments of the 1890 document was an editorial in the Jackson *Clarion-Ledger* of February 21, 1891:

> Is there any man in this State that understands the new

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* Professor of History, University of Mississippi. B.A. and M.A., Mississippi College; Ph.D., University of Southern Mississippi.

[1] *See* S.A. Patterson, Mississippi's Four Constitutions: A Study of Political Response to Societal Change 93-113 (Aug. 1974)(unpublished manuscript available in University of Mississippi Library)(discussing changes in Mississippi).

[2] Southwick, *State Constitution Revision: Mississippi and the South*, 32 MISS. LAW. 21, 21-25 (Nov.-Dec. 1985).

[3] *See* Calhoon, *The Causes and Events that Led to the Constitutional Convention of 1890*, 6 PUBL. MISS. HIST. SOC'Y 105, 105-10 (1902)(Calhoun was president of 1890 constitutional convention); *see also* A. KIRWAN, REVOLT OF THE REDNECKS, MISSISSIPPI POLITICS: 1876-1925, 58-84 (1951); Coleman, *The Origin of the Constitution of 1890*, 19 J. MISS. HIST. 69, 69-92 (Apr. 1957); Kirwan, *Apportionment in the Mississippi Constitution of 1890*, J.S. HIST. 234, 234-46 (May 1948); Marby, *Disfranchisement of the Negro in Mississippi*, 4 J.C. HIST. 318, 318-33 (Aug. 1938).

> Constitution? *The Clarion-Ledger* will give one hundred gold dollars for the discovery of such an individual.
>
> The Constitution has proven a 'mess' from first to last. Nobody understands it. The plain people do not comprehend it; the lawyers cannot interpret it; the Attorney General does not know how to construe it; the Governor does not understand it; and the Supreme Court judges cannot fathom its mysteries.
>
> It is a reflection on the State that a body of sensible men should have met here, remained in session three months, and adopted a mass of irreconcilable incongruities that nobody can understand. They ought to be required to return, burn up the thing that they have promulgated, begin anew . . . and submit the result of their deliberations to the people for ratification or rejection.
>
> The new-fangled Constitution has made the people real 'tired'. They are disgusted with the whole thing, and would wipe it out of existence if allowed the opportunity. And the opportunity will come.[4]

The Clarion-Ledger's claim that the people "would wipe it out of existence if allowed the opportunity" was, if nothing else, premature. Over the intervening century the people and their leaders have preferred to amend that constitution in lieu of beginning anew. On several occasions the people have declined the opportunity to "burn up the thing." Perhaps they declined those opportunities because they realized that the constitution is the state's fundamental law, and Mississippians are reluctant to change things that are fundamental and binding. As Mr. Jefferson said, "mankind are more disposed to suffer . . . than to right themselves by abolishing the forms to which they are accustomed."[5]

While Mississippians may be reluctant to abolish the constitution to which they are accustomed, they have been willing to amend it so often and to such an extent that today's constitu-

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[4] The Clarion-Ledger, Feb. 21, 1891, at 2, col. 2.

[5] The Declaration of Independence para. 2 (U.S. 1776). Governor Andrew Longino, Edmund Noel, Theodore O. Bilbo, Martin S. Conner, James P. Coleman, as well as William C. Waller, William Winter, and William Allain have advocated either new constitutions or major revisions of the existing document.

tion bears little resemblance to yesterday's. The constitution, as it now exists, has been shorn of the anti-business clauses, the racially discriminatory provisions, and most of the other antiquated stipulations that were a legacy of the late nineteenth century.

Although most of the nugatory and incongruous clauses have been deleted, the constitution of 1890 has not, according to many critics, been modernized. The structure of state government is still basically the same as it was nearly a century ago. To modernize and restructure state government, and thus to maximize Mississippi's financial resources, would require either many more amendments or one amendment so lengthy, elaborate, and intricate that neither the plain people nor the supreme court justices could "fathom its mysteries."[6]

Mississippians are now facing financial, governmental, and educational exigencies that are pressing them toward major constitutional reform. The question seems not to be whether constitutional revision will occur, but rather when and how will those revisions be formulated, by an elected convention or an appointed commission?[7] As Mississippians edge, some anxiously and others enthusiastically, toward "right[ing] themselves by abolishing the forms to which they are accustomed," it is at least interesting, if not instructive, to review the evolution of Mississippi's four constitutions and the historical process which produced them.

Mississippi's first constitution, which remained in effect until 1832, was drafted primarily by George Poindexter in 1817.[8]

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[6] The Clarion-Ledger, *supra* note 4, at 2, col. 2.

[7] *See* W.N. ETHRIDGE, MODERNIZING MISSISSIPPI'S CONSTITUTION 10-25 (1950)(discussion of 1890 constitution); T.E. KYNERD, ADMINISTRATIVE REORGANIZATION OF MISSISSIPPI GOVERNMENT: A STUDY IN POLITICS 34 (1978)(1890 constitution). *See generally* S.D. Davis, The Need for a New Mississippi Convention (unpublished manuscript)(Davis serves on Governor Allain's Constitutional Commission); A. Frishman, Mississippi's 1890 Constitution: Review of a Bygone Age (July 1983)(unpublished thesis).

[8] *See* Howerton, *Mississippi's Constitutional History,* YESTERDAY'S CONSTITUTION TODAY 3, 4 (1960)(discussion of 1817 constitution); *see also* E.A. MILES, JACKSONIAN DEMOCRACY IN MISSISSIPPI 33-37 (1961)(1817 constitution); M. SWEARINGEN, THE EARLY LIFE OF GEORGE POINDEXTER 140-59 (1934)(Mississippi's 1817 constitution). *See generally* Drake, *The Framing of Mississippi's First Constitution,* 28 J. MISS. HIST. 301 (Nov. 1967); *The Journal of the Constitutional Convention of 1817,* 29 J. MISS. HIST. 443 (1967)(reproduction of journal of entire convention).

Poindexter, an aristocrat and Federalist (but later a Whig), was one of Mississippi's most successful and influential politicians. Poindexter's constitution established a virtually part-time governmental structure in which the legislature appointed most state officials, including judges. Under Poindexter's constitution, judges were prohibited from serving beyond the age of sixty-five, and the governor, who served a two-year term, was allowed to succeed himself. The chief executive, who was not required to live in the capital, normally went to Jackson only when the legislature was in session. The 1817 constitution made no provision for its amendment except by the action of an elected state convention.

Under the 1817 constitution, stringent property qualifications for most state offices created a small, elite group of landed gentry who conducted governmental affairs. All voters were required to own some form of property or to hold membership in the state militia.[9] The governor was required to own 600 acres of land or personal property worth $2000, which might include a building, household goods, or slaves.[10] State senators had to own 300 acres or personal property worth $1000,[11] and representatives had to own 150 acres or personal property worth $500.[12]

In contrast to the federal Constitution, which declared that "no religious test shall ever be required as a qualification to any office or public trust,"[13] Mississippi's first constitution stated, "No person who denies the being of a God or a future state of rewards and punishments, shall hold office in the Civil department of this state."[14] Ironically, that same document prohibited ministers, priests, and presumably rabbis from serving as governor, lieutenant governor, or members of the legislature.[15]

After the adoption of the 1817 constitution, a draconian criminal code, also drafted by George Poindexter, was established. The Poindexter Code was often called the "Bloody

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[9] MISS. CONST. of 1817 art. III, § 1.
[10] MISS. CONST. of 1817 art. IV, § 3.
[11] MISS. CONST. of 1817 art. III, § 14.
[12] MISS. CONST. of 1817 art. III, § 7.
[13] U.S. CONST. art. VI, cl. 3.
[14] MISS. CONST. of 1817 art. VI, § 6.
[15] MISS. CONST. of 1817 art. VI, § 7.

Code," because it established so many capital crimes. Branding of criminals, public whippings, and the pillory were common forms of punishment meted out to both men and women convicted of petty crimes. Mississippi juries sometimes refused to convict defendants of minor crimes due to the severity of the penalties. The repeal of the Bloody Code was a major goal of constitutional reformers who became increasingly vocal in the decade following the adoption of the state's first constitution.[16]

During the 1820's a popular reform movement, known as "The Rise of the Common Man," prompted significant constitutional revision and caused several dramatic changes in America's social and political institutions. Mississippi was at the crest of that movement; its people raised demands for penal and political reform. Additionally, the Choctaw and Chickasaw land cessions, along with Mississippi's burgeoning population, required several technical changes in the state's constitution.[17] Since the 1817 constitution did not include an amendment provision, it could only be revised by a state convention.

In 1831, Mississippi voters by a four-to-one margin favored calling a convention to draft a new constitution. On September 10, 1832, forty-eight delegates met at Jackson to draft a new constitution. The 1832 Mississippi constitution was a model document. Stephen Duncan, a delegate to the convention, wrote to a friend and promised: "We will give you a constitution . . . much more *democratic* than any other in the U.S., not *republican* — but down-right and absolute *democracy*."[18]

The 1832 constitution abolished all property qualifications for voting or holding office, increased the number of state offi-

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[16] *See* E.A. MILES, *supra* note 8, at 33-37 (discussion of emphasis on penal reform); Drake, *The Mississippi Constitutional Convention of 1832*, 23 J.S. HIST. 354, 354-70 (1957)(penal reform in Mississippi); H.W. Butler, Penal Reform in Mississippi: 1799-1839, 108, 131 (1983)(unpublished manuscript available in the University of Mississippi Library).

[17] For example, the 1817 constitution limited the number of circuit court districts to eight. With the enlarging population, a tremendous burden was placed on the superior court judges, who also comprised the personnel of the supreme court. Therefore, either a separate supreme court needed to be established or the number of circuit courts increased. *See* Fortune, *The Formative Period*, A HISTORY OF MISSISSIPPI 251, 280-83 (1972)(discussing obsolete provisions of 1817 constitution).

[18] E.A. MILES, *supra* note 8, at 33.

cials, broadened the range of state services, created courts of equity, made virtually all governmental offices elective, discontinued the office of lieutenant governor, and required the governor to live in the capital. The governor continued to serve a two-year term, and the constitution prohibited his serving more than four years in a six-year period. The constitution provided for the abolition of imprisonment for debt, and for the establishment of the right of property for women. In addition, it ameliorated the state's criminal code. The new constitution did not abolish slavery, but it did make slaveowners criminally liable for cruel and harsh punishment of slaves.[19]

The constitution of 1832 was eventually superseded by secession, civil war, and Reconstruction. The thirteenth, fourteenth, and fifteenth amendments to the federal Constitution fundamentally altered the legal status of Mississippi's 436,631 blacks and mandated a new state constitution. In Jackson, on January 7, 1868, ninety-seven delegates, including seventeen blacks, drafted a constitution which incorporated the new order created in the aftermath of civil war into the state's fundamental law. Because that convention and other southern state conventions meeting at about the same time were integrated, they are known as the "Black and Tan Conventions."[20]

As originally drafted in 1868, the constitution severely restricted the rights of Mississippians who had supported secession and had fought for or aided the Confederacy. Because of those proscriptive clauses, the voters disapproved this constitution in the election of 1868. A year later, however, with those unpopular clauses removed, the electorate ratified the constitution.[21]

The 1869 constitution reestablished the office of lieutenant governor and made judicial posts above the county level appoin-

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[19] *See* E.A. MILES, *supra* note 8, at 3-33 (general discussion of provisions of 1832 constitution); Fortune, *supra* note 17, at 280-83 (same); Drake, *supra* note 16, at 354-70 (discussion of constitutional convention of 1832).

[20] W.C. HARRIS, THE DAY OF THE CARPETBAGGER 132-59 (1979); K.L. Hume, The Black and Tan Constitutional Conventions of 1807-1868 in Ten Former Confederate States 325-68 (1969)(unpublished manuscript).

[21] *See* J. GARNER, RECONSTRUCTION IN MISSISSIPPI 216, 245 (1901)(discussing ratification of 1869 constitution).

tive rather than elective. The governor's term was extended to four years, with no restriction on succession. The constitution also established a state-supported system of public schools. The "Black and Tan Constitution" conferred full citizenship upon Mississippi's black population and guaranteed the protection of their civil rights.[22]

A majority of white Mississippians were unwilling to accept the new social and political order established during the decade of Reconstruction.[23] Consequently, the state's white power structure formulated the "Mississippi Plan" in 1875,[24] a plan which endorsed the use of fraud and violence to reestablish white supremacy and regain control of state government.[25] Among its architects were Senator James Z. George, Ethelbert Barksdale, editor of the Jackson *Clarion*, and L.Q.C. Lamar.[26] Lamar told the people that "the safety of Mississippi lies in . . . its wise direction by conservative leaders."[27]

After the Democratic Party regained control of state government in 1876, it was evident that the white ruling elite would also use fraud and violence against other whites who challenged either their wisdom or their leadership.[28] A popular judge complained in 1890 that there had not been "a full vote or a fair count" in Mississippi since 1875.[29] Dissatisfaction with those "wise and conservative leaders" and their political tactics steadily increased, especially among the small white farmers in the northeast hills and piney woods.[30]

The impoverished whites with small farms, known derisively as "rednecks," accused the ruling elite of promoting the interests of business and commerce while neglecting their desperate con-

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[22] J. GARNER, *supra* note 21, at 211-215; W.C. HARRIS, *supra* note 20, at 132-59; V. WHARTON, THE NEGRO IN MISSISSIPPI 59, 103, 146-51 (1965).

[23] *See* C. Sallis, The Color Line in Mississippi Politics (1967)(dissertation available in University of Mississippi Library)(study of Mississippi Plan and reestablishment of white supremacy).

[24] *Id.*

[25] *Id.*

[26] A. KIRWAN, *supra* note 3, at 48.

[27] E. MAYES, LUCIOUS Q.C. LAMAR: HIS LIFE, TIMES AND SPEECHES 397 (1896).

[28] A. KIRWAN, *supra* note 3, at 23.

[29] *Id.* at 58.

[30] *Id.* at 40.

dition.[31] The rednecks concluded that the only way they could dislodge the existing power structure was through a new constitution which removed Mississippi's black population from the political process.[32]

Although very few blacks actually voted after 1876, the ruling elite played upon that ominous possibility in order to frustrate the rise of parties or factions which challenged their power.[33] The Democratic leadership branded all other parties or rival factions as "Republicans in disguise" and advised all white Mississippians to remain united.[34] The "wise and conservative leaders" proclaimed with mathematical certainty that the equation, w ÷ w = B [whites divided by whites equals black domination], controlled Mississippi politics.

To counter the otherwise unassailable logic of that equation, the rednecks planned to alter the equation itself. They conspired to remove "B" from the equatation by "constitutionally disenfranchising" Mississippi blacks through the use of clever and carefully designed suffrage requirements.[35] Colonel B.F. Jones offered a swift and simple solution: "The old men of the present generation can't afford to die and leave their children with shotguns on their laps, a lie in their mouths, and perjury on their souls to defeat the negroes. The constitution can be made so this will not be necessary."[36] The rednecks also hoped to exploit their numerical superiority by calculating legislative apportionment exclusively on the basis of white population rather than total population.[37] By achieving these two goals, the rednecks envisioned the transfer of political power, with all its emoluments and privileges, from the white elite to the redneck majority. The rednecks presumed that only through a new constitution could they achieve those two goals, and therefore their demand for constitutional reform became the most persistent political issue in the late 1880s.

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[31] *Id.* at 43-48.
[32] *Id.* at 58-59.
[33] *Id.* at 18-26.
[34] *Id.* at 20.
[35] *Id.* at 59.
[36] V. WHARTON, *supra* note 22, at 207.
[37] A. KIRWAN, *supra* note 3, at 78.

Eventually the farmers' demand for a new constitution gained support from other reform groups, including prohibitionists and penal reformers.[38] Even some members of the ruling elite conceded that fraud at the ballot box was chronic and seconded the call for a convention to draft a new constitution.[39] Judge J.J. Chrisman admitted in 1890: "[I]n plain words we have been stuffing the ballot boxes, committing perjury, and . . . carrying the elections by fraud and violence until the whole machinery for election was about to rot down."[40]

On August 12, 1890, a convention of 134 delegates assembled in Jackson to draft a new constitution.[41] The document eventually produced by that convention was the result of bitter and acrimonious in-fighting between the ruling elite and the rednecks and other reformers who sought to end their control.[42]

The constitution of 1890 disfranchised Mississippi blacks through a complex set of suffrage requirements which included a literacy test and a poll tax.[43] Those requirements also eliminated approximately 50,000 whites who were either illiterate or too poor to pay the poll tax.[44] The elimination of such a large number of poor whites was by design, not by accident.[45] By controlling the convention committee structure and skillfully manipulating the drafting process, the "wise and conservative leaders" wrote into the final document a number of provisions that both perpetuated their rule and diluted the voting strength of the poor whites.[46]

First, the ruling elite designed a legislative apportionment scheme that did not attenuate their own power base in the predominantly black counties of the Delta, the counties along the southern stretch of the Mississippi River, and the prairie counties in eastern Mississippi.[47] Apportionment under the new

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[38] V. WHARTON, *supra* note 22, at 208.
[39] A. KIRWAN, *supra* note 3, at 58.
[40] *Id.*
[41] *Id.* at 65.
[42] *Id.* at 66.
[43] *Id.*
[44] *Id.* at 63.
[45] *Id.* at 71.
[46] *Id.*
[47] *Id.* at 78.

constitution was based on the total number of male citizens over twenty-one years of age, rather than upon white population exclusively, as the rednecks had wanted.[48] The white power structure then vested great authority in the legislative branch of the state government, which they continued to control.[49]

Because the governor was to be elected by popular vote, and thus was likely to represent the redneck majority, the ruling elite established a weak and fragmented executive branch. They also undermined the governor's ability to sustain any continuity of policy by prohibiting gubernatorial succession.[50] The executive authority was divided among several independently elected officials, who were not required by the constitution to cooperate or communicate with each other in formulating state policies and procedures.[51]

Basically, the constitution of 1890 established an imbalance of power between the legislative and executive branches of government.[52] More importantly, it did not include an adequate checks and balance system, which is fundamental to the working of a democracy. The constitution included no check on the independently-elected executive officials other than the legislature's power over the biennial budgets of the executive branch. Conversely, the governor had virtually no check on the legislative branch.

The constitution of 1890 also included several controversial anti-business provisions that were scheduled to take effect in 1900. Those provisions repealed the tax exemptions and other inducements that were designed to attract new businesses and factories to Mississippi. The repeal provisions were not automatic, however, and they required legislative enactment.[53]

After the election of Governor James K. Vardaman in 1903, and for nearly three decades thereafter, the legislature passed many laws that dissuaded new industry from locating in Missis-

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[48] *Id.*
[49] A. KIRWAN, *supra* note 3, at 244-45.
[50] *Id.* at 245.
[51] *Id.*
[52] Rogers, *Corporations*, YESTERDAY'S CONSTITUTION TODAY 82, 82-94 (1960).
[53] *Id.*

sippi.[54] Mississippi's judicial system was also notoriously anti-business and few corporations believed they were able to gain fair and impartial decisions in Mississippi courts.[55]

By the time of the Great Depression, Mississippi acquired such an anti-business reputation that Governor Martin S. Conner concluded that a new constitution was necessary in order to repair the state's national image and to give Mississippi a chance to attract more industry.[56] Governor Conner's plea for a new constitution went unheeded, however, as the legislature and the people struggled to cope with the more immediate problems of poverty and depression.

Following World War II and the sweeping changes of the early 1950's, the issue of constitutional reform resurfaced during the gubernatorial campaign of 1955.[57] In 1957, Governor Coleman, who initially raised the issue of constitutional reform during his 1955 campaign, called a special session of the legislature to consider the question of a state constitutional convention.[58] After a strenuous debate, the legislature declined to call such a convention.[59] The legislature's primary objection to constitutional revision was that the civil rights movement had already created such unstable and volatile circumstances that Mississippi need not distract itself further by the disputations that would arise from the rewriting of the state's fundamental law.[60]

After the civil rights movement ran its course, and as Mississippians concentrated on economic progress, the 1890 constitution again became the focus of public debate. Various constituencies blamed the old constitution for Mississippi's being in last place in so many economic and educational categories. Some

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[54] W. HOLMES, THE WHITE CHIEF, JAMES K. VARDAMAN 146-47 (1970).

[55] *Id.*

[56] Address by Governor Martin S. Conner, 1934 MISS. HOUSE J. 24-27 (Jan. 3, 1934).

[57] *See* Address by Governor J.P. Coleman, 1957 MISS. HOUSE J., EXTRAORDINARY SESS., 1494-1500 (Sept. 9, 1957)(need for Mississippi to call new constitutional convention).

[58] *Id.*

[59] *See* Letter from Speaker of the House Walter Sillers, 1957 MISS. HOUSE J., EXTRAORDINARY SESS. 1655-60 (1957).

[60] *Id.* at 1656. Sillers wrote: "The purpose of a constitution is to safeguard its fundamental principles from the rashness of temporary excitement . . . changes in government are to be feared unless the benefit is certain." *Id.*

critics asked why the constitution did not allow the governor to succeed himself. Another popular charge against the 1890 constitution was that it gave the legislature, and particularly the speaker of the house, too much power. Still others asked why the constitution prohibited the state from establishing a lottery.

One constitutional issue of lingering public interest has been gubernatorial succession.[61] In 1972, Governor William Waller strongly supported a constitutional amendment permitting gubernatorial succession.[62] Every governor since Waller has endorsed, in principle at least, the idea of gubernatorial succession.

In 1975 and 1983, Gil Carmichael, the Republican candidate for governor and lieutenant governor respectively, made the adoption of a new constitution one of the central issues of his campaigns. In 1983, he appointed a bipartisan committee to document the need for constitutional revision and to propose a means for adopting a new state constitution. Although Carmichael lost the election, the Committee recommended that the legislature establish a procedure by which a new constitution could be drafted and adopted by the people of the state.[63] The 1984 legislature took no action on the Committee's recommendation.

In the next session, however, the Mississippi Legislature responded to the increasing public support for gubernatorial succession by adopting a constitutional amendment which allows the governor to serve two four-year terms.[64] The amendment was ratified by the electorate on November 4, 1986.[65]

Probably the most significant step toward major constitutional revision in recent years came on November 8, 1985, when Governor Bill Allain appointed a 350-member commission to draft a new state constitution. The Commission, which is composed of a broad range of citizens and professionals, has now

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[61] *See* Address by Governor William Waller, 1974 MISS. HOUSE J. 75 (July 14, 1974)(governor endorsed concept of people deciding whether governor can serve two successive terms).

[62] *Id.*

[63] Recommendation of the Carmichael Constitutional Convention Resolution Committee (Aug. 30, 1983).

[64] H.R. CON. RES. 5, 1986 Leg. Sess. (Miss. 1986).

[65] *See supra* note 64 and accompanying text.

completed a working draft of a new state constitution. However, Governor Allain's Constitutional Commission, which was established by executive authority, has no power to act beyond the matter of drafting a document. Although several prominent legislators have served on the Governor's Commission, the legislature has not officially sanctioned the work of the Commission. When the final draft of the constitution is completed, the document will be laid before the legislature which, under the existing constitution, has the authority to implement the amendment process.[66]

As the United States approaches the bicentennial celebration of the federal Constitution in 1987, and as Mississippi approaches the centennial of its own constitution in 1990, public interest in constitutional issues is at a level unparalleled in the state's history. That interest in constitutional reform will likely culminate in the adoption of a new state constitution within less than a decade.

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[66] *See* Ripley, *The State We're In*, The Clarion-Ledger, Dec. 8-15, 1985 (tabloid)(analysis of possible success of Governor Allain's Commission and probable opposition to significant constitutional revision).

METHODS OF CONSTITUTIONAL REVISION: WHICH WAY MISSISSIPPI?

*Leslie H. Southwick**
*C. Victor Welsh, III***

> I am certainly not an advocate for frequent and untried changes in laws and constitutions . . . . But I know, also, that laws and institutions must go hand in hand with the progress of the human mind . . . . [L]et us provide in our Constitution for its revision at stated periods. What these periods should be, nature herself indicates . . . . Each generation is as independent of the one preceding as that was of all which had gone before. It has then, like them, a right to choose for itself the form of government it believes most promotive of its own happiness . . . .
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> Thomas Jefferson, 1816[1]

Thomas Jefferson believed that a state's fundamental law shaped and directed the progress of that community. The "Sage of Monticello" suggested mandatory periodic revision to ensure that a constitution kept pace with society. In the 19th century, Mississippi heeded this counsel as new constitutions were written at conventions in 1817, 1832, 1868, and 1890.[2]

Since 1890, despite intermittent revision efforts that coincided almost exactly with Jefferson's timetable of once every generation, no convention has been held.[3] The reluctance may

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The views expressed in this article are solely those of the authors, and not those of their law firm.

[1] THE JEFFERSONIAN CYCLOPEDIA 199 (John P. Foley ed. 1900).

[2] Howerton, *Mississippi's Constitutional History*, YESTERDAY'S CONSTITUTION TODAY 3, 3-8 (1960).

[3] In 1916, 1934, 1957, and 1975 the Governor or a candidate for that office promoted

be partly explained as a belief, first, that constitutional change is not that important, and second, that it is better to endure the ills we have than to risk those we know not of.[4] Frequent patchwork amendments, and not a complete overhaul, have been the norm for 97 years. Comprehensive constitutional revision has been toppled from its once honored position and banished for being too untrustworthy and volatile.

This analysis starts with the assumption that Mississippi needs to adopt a constitution that reflects the optimistic, utilitarian viewpoint of Jefferson, and not acquiesce in the pessimistic view that the state constitution, rather paradoxically, is both too irrelevant and too dangerous to overhaul. The study will not focus on the changes that might be most significant if a new state charter is prepared. The limited but multifaceted review that will be attempted here first assumes that fundamental changes are necessary, and then compares the efficacy of various procedures to accomplish those changes. The beginning assumption is that constitutional reform in Mississippi should not be merely cosmetic, but instead that critical choices involving significant public interests need to be made. Using both the experience of other states and the legally available alternatives in Mississippi, conclusions will be offered about the promise, and the pitfalls, of each procedure.

I. Methods of Constitutional Change: An Overview

Constitutional revision is a broad category, extending from a single amendment affecting only one article, to the preparation of a comprehensive new document. Some of the procedures are firmly established by statute or constitutional article, while others are ad hoc and largely extra legal. Most involve using a separate body to prepare the revision, with final adoption reserved to the people. Revision procedures at times overlap, with

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a comprehensive new constitution, but failed to gain legislative approval. McCain, *The Triumph of Democracy 1916-1932*, 2 A History of Mississippi 62 (R. McLemore ed. 1973); Southwick, *infra* note 24, at 21-25. In 1985, a new campaign began, which may not be concluded.

[4] Graves, *State Constitutional Law: A 25 Year Summary*, 8 Wm. & Mary L. Rev. 1, 4, 7 (1966).

the utilization of one being preparatory to the convening of another. In Mississippi, the procedures usually considered available include (a) amendment by the legislature, with submission to the people, and (b) a constitutional convention with popularly elected delegates. A third method, (c), underway currently in Mississippi begins with preparation of a draft constitution by a gubernatorially appointed commission. The draft could either be the foundation for a convention's work, or might instead be submitted to the legislature for possible revision and ultimate submission to the people. The latter course has uncertain legal validity. A final and also tenuous procedure under current Mississippi law, is (d) proposing an amendment or convention through popular initiative, using a mechanism questionably voided in 1922.

Constitutional change has been a cyclical concern in the American states. Major public events such as the Civil War, or the appearance of powerful new political movements, including the Jacksonian Revolution in the 1830's and the Populist and Progressive era from the 1890's to the 1920's, have led to major reforms in state constitutions in reaction to the circumstances.[5] From 1776 until 1981, at least 145 constitutions had been operative in the various states. From 1945 until 1981, almost a third of the states adopted new constitutions. Many others undertook substantial, comprehensive revisions. Though much interest and activity has been present, success has not always resulted. For example, seven conventions in the past thirty years prepared new state charters that were rejected by the voters. Indeed, of the sixty-two popular referendums concerning whether even to hold a convention that were held between 1930 and 1981, only thirty-five were approved, while twenty-seven were rejected.[6] Nonetheless, constitutional reform has raged through America in modern times. Few states have escaped a serious attempt at updating their fundamental law. Modern attempts to revise state constitutions face a new element, namely, the impact of the Vot-

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[5] Hall, *Mostly Anchor and Little Sail: The Historical Development of American State Constitutions*, A CONTEMPORARY ANALYSIS OF MISSISSIPPI'S CONSTITUTIONAL GOVERNMENT: PROCEEDINGS AT A FORUM 127, 127-49 (D. Brammer and J. Winkle eds. 1986).

[6] Sturm & May, *State Constitutions and Constitutional Revision: 1980, 1981 and the Past Fifty Years*, THE BOOK OF THE STATES 115, 115-16, 118, 121-22 (1982-83).

ing Rights Act in affected jurisdictions. A discussion of that statute will be presented first. Then, using the perspective of other states' experience with the same procedures, Mississippi's four options—commission, legislative action, popular initiative, and convention—will be reviewed in some detail.

II. Impact of Voting Rights Act

Mississippians, as other southerners, rightly concern themselves that there is a higher, but not always benevolent nor perfect, authority than themselves when it comes to adopting constitutions and other laws in their state. That arbiter is the United States Department of Justice, operating under the provisions of the Voting Rights Act.[7] The passage of The Voting Rights Act has given a more specific dimension to a concern that has long existed in this state regarding a new constitution. For example in 1957, eight years before there was a Voting Rights Act, one of the principal arguments of opponents of then Governor J.P. Coleman's effort to revise the constitution was that it would be the federal courts that would ultimately write the document, not the people or their delegates.[8] These occasional concerns are based on the fact that the United States Department of Justice and the courts, in interpreting the Voting Rights Act, have authority to object to some parts of a new constitution. However, the likelihood and the nature of such objections should not be viewed in a vacuum, but instead through an understanding of the terms of the Voting Rights Act and the experience of those states affected by it. Of particular relevance is the difficulty, if any, other southern states have had in adopting new constitutions.

Section 5 of the Act requires that an affected jurisdiction, if it desires to "enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," shall submit the proposal to the United

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[7] 42 U.S.C. § 1971 (1976); *see* Comment, *Mississippi and the Voting Rights Act, 1965-1982*, 52 Miss. L.J. 803 (1982)(detailed review of Voting Rights Act).

[8] *See, e.g.*, Committee of 25, This is No Time to Tamper with our Constitution 3-4, 7-9, 32-33 (1957).

States Attorney General.[9] The Justice Department has 60 days in which to lodge an objection.[10] Even if no objection is made in that time period, the Attorney General may thereafter seek to enjoin enforcement.[11] Moreover, any party dissatisfied with the Attorney General's decision, whether it is to approve or object, may file suit.[12]

The Voting Rights Act was initially adopted on August 6, 1965,[13] and has been revised on several occasions, most recently on June 29, 1982.[14] One of the more recent United States Supreme Court pronouncements on the standard by which submissions are to be tested comes from *N. A. A. C. P. v. Hampton County Election Commission.*[15] It quoted with favor the following Justice Department regulation:

> Any change affecting voting, even though it appears to be minor or indirect, even though it ostensibly expands voting rights, or even though it is designed to remove the elements that caused objection by the Attorney General to a prior submitted change, must meet the Section 5 pre-clearance requirement.[16]

Thus, if a change affects voting, even tangentially, it must be cleared by the Justice Department before being implemented. The covered jurisdiction has the "burden of demonstrating that the changes are not motivated by a discriminatory purpose and will not have an adverse impact on minority voter."[17]

Regardless of the pre-clearance requirements of Section 5 of the Voting Rights Act, section 2 mandates that no

> [V]oting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a

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[9] 42 U.S.C. § 1973c (1976).
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] 42 U.S.C. § 1971 (1976)(initially promulgated as Pub. L. 89-110).
[14] 42 U.S.C. § 1971 (1976)(latest version enacted as Pub. L. 97-205).
[15] 470 U.S. 166 (1985).
[16] *Id.* at 179 (quoting 28 C.F.R. § 51.11 (1984)).
[17] McCain v. Lybrand, 465 U.S. 236, 247 (1984).

> class of citizens [on account of race or color] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.[18]

This "results oriented" standard is to be applied by the federal courts to any voting practice in an affected jurisdiction, while the section 5 pre-clearance rules merely establish when the state must submit new laws affecting voting to the Justice Department. Adopting a new constitution that made no changes to any voting practice other than to renumber sections and perhaps modernize language would not need to be submitted, and promulgating that new constitution would in no way violate Section 5 of the Voting Rights Act. However, all of those sections, whether in a new constitution or an old one, are subject to the section 2 mandate that they not have a racially discriminatory impact.

In the more than two decades since the Voting Rights Act was adopted, only one objection has been made by the Justice Department to any part of a comprehensive new constitution from one of the southern states.[19] That occurred in 1970 when North Carolina readopted as part of its new state charter an old provision imposing a literacy test for voter registration.[20] No objections resulted from submission of a new Virginia Constitution in 1970, or one that was submitted and ratified in stages by South Carolina in 1970, 1972, and subsequent years.[21] No preclearance was sought prior to voter action on a new Alabama

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[18] 42 U.S.C. § 1973 (Supp. 1986); *see* Thornburg v. Gingles, 105 S. Ct. 2137 (1986)(first case dealing with 1982 amendment to § 2); *see also* Comment, *The Results Test of Amended Section 2 of the Voting Rights Act*, 54 MISS. L.J. 289 (1984).

[19] Information from Lora Tredway, Attorney-Reviewer, Voting Section, Civil Rights Division, United States Department of Justice (January 12, 1987).

[20] *Id.*; N.C. CONST. art. VI, § 4, (1970). Since there was no change from former practice, this apparently was not a proper section 5 objection.

[21] Information from Lora Tredway. *See supra* note 19.

Constitution proposed in 1983,[22] and one in Texas in 1975.[23] Neither document was ratified at the polls, which removed the need for subsequent review. In 1982 Georgia adopted a new constitution.[24] It was first drafted by the state legislature, and then submitted to the voters.[25] The draft of the constitution was submitted to the Justice Department after final legislative action, and prior to the referendum by the voters.[26] No objections were lodged and the referendum was held as scheduled.[27] When the Louisiana constitutional convention completed work in 1973, it adjourned subject to call in the event objections were raised in Washington. The president of the convention and two other members then met with Justice Department officials.[28] The result was that the final document was pre-cleared without objections.[29] In sum, five southern states have adopted new constitutions since the passage of the Voting Rights Act. According to Justice Department records, only one document elicited an objection under the Act.

Figures available from the Justice Department regarding objections reveal that since the passage of the Act in 1965 until April 30, 1986, there have been approximately 108,000 submissions of voting changes to the Justice Department.[30] Through December 31, 1985, objections had been entered to 1,233, or slightly over one percent.[31] Examining the southern states' experience indicates Mississippi has the highest percentage of sub-

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[22] Information from Alabama State Senator Ryan deGraffenried, Jr., sponsor of the legislation, and Jane Davis, an aide in 1983 to the relevant senate committee (January 14, 1987). The act proposing the new constitution contained no directive that it be submitted to the Justice Department. 1983 Ala. Acts 1072-1125.

[23] Information from the Public Information Office, Office of the Attorney General, State of Texas (January 13, 1987).

[24] Southwick, *Constitutional Revision: Mississippi and the South*, 32 MISS. LAW. 21, 21-25 (Nov.-Dec. 1985).

[25] Telephone interview with Melvin B. Hill, Jr., former staff attorney for Georgia Constitutional Convention (September 4, 1986).

[26] *Id.*

[27] *Id.*

[28] Telephone interview with E.L. Henry, President of the 1973 Louisiana Constitutional Convention (Jan. 15, 1987).

[29] Information from Lora Tredway. *See supra* note 19.

[30] Information provided by Lora Tredway on September 17, 1986. *See supra* note 19. No up-to-date printed compilation is apparently available.

[31] *Id.*

missions to which objections have been made, but still less than five percent.[32]

State	Submissions	Number of Objections	Percentage Objections
Alabama	4,377	103	2.35%
Florida	1,106	3	.27%
Georgia	11,526	267	2.32%
Louisiana	5,353	164	3.06%
Mississippi	2,957	139	4.70%
North Carolina	2,945	122	4.14%
South Carolina	6,335	205	3.24%
Texas	45,209	164	.36%
Virginia	9,434	28	.30%[33]

Appearing in the Act is the third set of standards adopted by Congress for determining which states or political subdivisions are subject to section 5 pre-clearance.[34] All of nine states and parts of thirteen others meet the present inclusion standards.[35] Arkansas and Tennessee alone of the states of the old Confederacy are entirely exempt, while only five Florida counties and forty counties in North Carolina are subject to pre-clearance restrictions.[36] The entirety of only two states outside of the South, Arizona and Alaska, are covered, and then not until 1972, though a small number of Arizona counties had earlier been brought under Section 5.[37] Five or fewer political subdivisions of

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[32] *Id.*

[33] *Id.* With the exceptions of Florida (1972-85), and Texas (1975-85), these figures are for November 1, 1964 through December 31, 1985.

[34] 42 U.S.C. § 1973b (Supp. 1986).

[35] 28 C.F.R. § 51.54 (1985).

[36] *Id.*

[37] *Id.* Arizona has encountered 20 objections to 6,074 submissions (.329%); no objections occurred to any of Alaska's submissions.

nine other states must pre-clear voting changes and somewhat larger portions of two more states must as well.[38]

The potential is definitely present for objections to be made to voting changes enacted under a new constitution. Even the procedure adopted to select delegates to a constitutional convention would need to be submitted to the Justice Department. Nonetheless, the experience of other states who have undertaken this process is to have minimal if any difficulty under the Voting Rights Act. Even Mississippi's record of receiving more negative scrutiny than other states still reveals only a modest problem; fewer than one of twenty submissions from the state have received objections.[39] The recent approval of Mississippi's comprehensive Election Code package, which included some provisions which had previously been rejected by the Justice Department, may indicate a less suspicious attitude in Washington.[40] If a new constitution is written by a convention, legislature, or other body, then submitted to the Justice Department and some part of the sections affecting voting are disapproved, then a predetermined result could easily be in place. The body proposing the constitution could provide that if any objections arise from the Justice Department, that body will reconvene and consider what action to take. If it is determined to make changes to conform to the objections, then the document can be re-submitted for preclearance. Instead some other action might be deemed appropriate, including asking the state attorney general to seek relief in court. Regardless, at no stage does the Justice Department have carte blanche to choose selectively the revisions it likes and those it does not, and impose upon the state the result of its labors. Section 5 of the Voting Rights Act does not give to the Justice Department any authority to rewrite laws, but only to approve or disapprove what the states have written.The regulations permit submitting a change prior to final adoption, if all that is lacking for finality is a popular referendum.[41] Thus the

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[38] *Id.*

[39] *See* Comment, *supra* note 7, at 834-38 nn. 221-22 (list of total submissions and objections annually through 1982).

[40] McIntosh, *State Election Reforms Gain Federal OK*, The Clarion-Ledger/Jackson Daily News, Jan. 3, 1987, at A1, col. 4.

[41] 28 C.F.R. § 51.20 (1985).

constitution could be submitted prior to ratification by the people, so that the Voting Rights uncertainties will be resolved in advance.

The potential of the Voting Rights Act adversely impacting the writing of a new constitution is legally present, but practically speaking, relatively insignificant. Since what the final document states will always be the decision of Mississippians, even if circumscribed by federal officials, this federal statute should be viewed only as a hurdle, not as a trap.

III. Revision Methods

A. Appointive Commission

Appointed constitutional commissions serve basically two purposes. They may either study the desirability of changes and make specific recommendations, usually to the legislature, or else are called to prepare for a constitutional convention that is scheduled to commence later.[42]

A constitutional commission can be established in several ways. During the decade of the 1970s, which saw the greatest amount of constitutional reform during the 20th century, twenty-three constitutional commissions were established. Of these, sixteen were established by statute, four were appointed by the legislature, and three were established by governors. According to Professor Albert L. Sturm, these commissions possessed the following characteristics:

> [W]ide variation in formal authority and mandate; average membership of approximately twenty, mostly appointed by legislative, executive, and judicial officers, with a small number serving ex officio, widely representative of major constituent interests; a chairperson with extensive experience in public life, typically designated by the governor; establishment of a committee structure and employment of a professional staff; part-time service of members who meet at varying intervals at the state capital; public financing, usually by legislative appropriation; varying duration, with an average of approximately sixteen months; reports of varied scope, content, and format rang-

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[42] Sturm & May, *supra* note 6, at 123-24.

ing up to a draft constitution with commentary.[43]

Probably the greatest advantage of the constitutional commission is the ability to create a small body of specialists able to render expert advice.[44] The smaller size of these commissions also speeds up the decisionmaking process, creating a more economical system of reform. The major deficiency of constitutional commissions is that they are often subjected to the political biases of those who appoint them. For example, the report of a commission appointed by the legislature or by the governor might easily unduly reflect the goals of the appointing authority.[45] A serious limitation that needs to be remembered is that commissions are preliminary bodies whose final product—whatever its quality—is then reviewed and revised by others. Apparently only one state, Florida, grants a commission the constitutional authority both to prepare a new constitution and then submit it directly to the people for approval.[46] Thus whatever the perceived strengths of a commission, its work is often dramatically altered before submission to the people.

Commissions that are created by state statute usually submit their recommendations to the legislature. As in Mississippi, those commissions appointed by the governor report back to him. Mississippi's constitutional study commission is unique in at least two respects. From 1930 through 1981, eighty-eight commissions were called. Though information on some of the commissions is difficult to obtain, it seems that none of them numbered more than eighty members.[47] In contrast, Mississippi Governor Bill Allain, with the assistance of former Governor J.P.

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[43] Sturm, *The Procedures of State Constitutional Change—With Special Emphasis on the South and Florida*, 5 FLA. ST. UNIV. L. REV. 569, 587 (1977) [hereinafter cited as Sturm, *Procedures*]; *see also*, Sturm, *State Constitutions and Constitutional Revision; 1978, 1979 and the 1970's*, THE BOOK OF THE STATES 1, 8 (1980-81) [hereinafter cited as Sturm, *Constitutional Revision*].

[44] Graves, *supra* note 4, at 10.

[45] Sturm, *Procedures*, *supra* note 43, at 587-88.

[46] Sturm, *Constitutional Revision*, *supra* note 43, at 1.

[47] *See, e.g.*, Sturm, *State Constitutions and Constitutional Revision, 1972-1973*, THE BOOK OF THE STATES 3, 16-18 table 1 (1974-75). A review of the tables included in each volume of THE BOOK OF THE STATES did not reveal any commissions that had more than 80 members. However, detailed treatment of commissions in those volumes commenced only in the 1960's.

Coleman, appointed a 349 member commission in November, 1985.[48] Secondly, most commissions have been created by state statute or authorized by executive order of the governor. There appears, however, to have been a conscious decision by the Mississippi governor not to issue an executive order. This made the commission more informal and perhaps less susceptible to the kinds of arguments Allain himself made as attorney general, those being that the separation of powers article of the present constitution forbade members of one branch of government to serve on commissions properly within the realm of another.[49] If an executive order had created the commission, thereby conceivably making the body a part of the executive branch, it arguably would not have been proper for current state judges and legislators to serve on the commission.

The commission prepared a draft document which was then submitted to Governor Allain.[50] Since the commission is of his own making, without formal written responsibilities or rights, there would have been no impediment to the governor substantially revising the commission's work if he so desired.[51] What the legislature legally can do with the commission's draft, with the realm of choices extending from doing nothing to calling a convention, or even to attempting to present an entire new constitution to the people, will be discussed next.

B. Legislative Action: Amendment or Total Constitutional Revision

Constitutional revision through piecemeal legislative amendments is by far the most popular method for altering state constitutions. As of 1981, legislative amendments had accounted for 88.3% of all constitutional revision methods submitted to voters in the fifty states, and had an adoption rate of

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[48] Davis, *Constitution Commission Begins Work This Week*, The Clarion-Ledger, Dec. 9, 1985, at A1, col. 1.

[49] Alexander v. State, 441 So. 2d 1329, 1345 (Miss. 1983).

[50] The final draft constitution adopted December 18, 1986, has been published in 3 JACKSON JOURNAL OF BUSINESS 27-35 (Jan. 1987) [hereinafter cited as "Draft Constitution"].

[51] Rabb, *Constitutional Panels Eye Changes, Some Suggestions Could Tip Balance of Power*, The Clarion-Ledger/Jackson Daily News, Mar. 23, 1986, at A1.

90.8%, the highest of all possible methods. These numbers clearly emphasize the key role that state legislatures play in the constitutional revision process.[52]

The problems with this method are three-fold. The initial, and most obvious shortcoming, is that piecemeal amendments rarely are part of a master plan of comprehensive revision. Smaller, immediately perceived needs result in amendments being proposed and government as a whole is not reformed.[53] A second problem can be the substantial burden placed on the electorate by the vast number of proposals submitted for their vote or, by contrast, the individual complexity of each specific amendment. For example, in the 1980 Georgia general election voters were asked to vote on 137 proposed amendments. This submission of amendments to the voters of Georgia was one of the most comprehensive attempts of constitutional revision by legislative reform[54] and doubtlessly among the most unwieldy and confusing.

The final major deficiency arises from the nature of the legislative institution. On the one hand, it is certainly asking too much of a deliberative body to concern itself with the fundamental nature of state government necessary to draft a constitution, while simultaneously having to deliberate on the multitude of day-to-day issues that flood the legislature each session. On the other hand, if the legislature attempted to write a new constitution in a special session, at which the pressures of daily state business would be absent, there would still be serious handicaps caused by the political pressures that would be brought upon them by various special interest groups. Almost all legislators, as well as other officials, are public-spirited and well-intentioned. Even so, human nature warns that a constitution written by the legislature might also be for the legislature, and thereby create a government of the legislature. To the extent a state such as Mississippi suffers problems of legislative dominance in the structure of government, it can hardly be expected that the legislature will alleviate the problem. Two recent legis-

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[52] Sturm & May, *supra* note 6, at 118-19.

[53] Graves, *supra* note 4, at 1, 11-12.

[54] Sturm & May, *supra* note 6, at 117.

lative attempts, overwhelmingly rebuffed by the people, to alter the conflicts of interest article of the constitution are additional indicators that regardless of the quality of a legislature-drafted charter, the electorate might be suspicious and predisposed to reject the revision.[55]

There are admittedly some advantages to constitutional revision by legislative action. The most notable is the ability to tap the expertise of an established law-making body with a high interest in legal and public affairs. Some state legislatures have attempted limited constitutional reform by editorially revising or recodifying the existing state charter.[56] Fundamental change in the nature of state government does not occur, but a more readable, logical, and modernized document results. It would appear, however, that it is only when the goals of constitutional revision are thus limited, i.e., by mere editorial improvement, not substantive adjustment, that the advantages of total legislative revision overcome the handicaps of self-interest and lack of time.

Regardless of whether the legislature should rewrite the constitution, a more basic question is whether that body legally can do so. Section 273 of the Mississippi Constitution authorizes the legislature to "change, alter or amend" the document. This can only be done pursuant to a vote of two-thirds of the legislature constituting a majority of both houses, which must be done on three separate days. In addition, any amendment proposed by the legislature must be "submitted in such manner and form that the people may vote for or against each amendment separately." This manner of constitutional revision has been responsible for approximately 120 proposed amendments to the Mississippi Constitution over the years, with ninety approved by the

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[55] The 1984 Mississippi Legislature proposed weakening article 109 of the Mississippi Constitution. 1984 Miss. Laws 665, at 907. The voters rejected the attempt with only 251,742 in favor, and 348,999 opposed. Unpublished vote totals, Mississippi Secretary of State's office. A similar relaxing of conflict of interest standards was attempted in 1986. H. R. Con. Res. 63, Miss. Leg. Reg. Sess. (1986). Again the electorate rebelled, with unofficial returns indicating 74,011 in favor and 125,593 opposed. McIntosh, *Ethics-Change Defeat Spurs Crackdown*, The Clarion-Ledger, June 5, 1986, at A18, col. 2.

[56] Sturm & May, *supra* note 6, at 119.

voters.[57]

Though no doubt exists that individual amendments can be proposed by the Mississippi Legislature, a serious question arises on the legality of an entire new constitution being submitted by that body. Does the right under article 273 to "change, alter or amend" the constitution include the power to write and propose an entire new document? Alabama in November, 1978, began a process similar to that suggested for Mississippi. In that month, Alabama's governor formed a twenty-two member study commission to prepare a draft constitution. The governor submitted the document to the legislature which after revisions called for a referendum to be held November 8, 1983.[58] A week before the scheduled election, the Alabama Supreme Court voided the process. The court interpreted state law to require that any new constitution be prepared by a popularly elected convention.[59]

In somewhat similar fashion, the Arkansas Legislature in 1975 called for a convention solely of appointed delegates. Not only were there no elected delegates, but also no voter referendum was held. In the enabling act, the legislature required that

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[57] Unlike the federal constitution, amendments to the Mississippi document are not, after adoption, listed and numbered separately. Instead, they are incorporated in the body of the constitution. Any older provision that is specifically replaced by the new language disappears from the constitution. Thus it is not easy to determine exactly how many amendments there have been. One computation prepared by two members of the Mississippi Governor's staff shows 74 amendments approved, and 11 sections repealed. Twenty-five amendments and five repeal attempts have been rejected. (These numbers were derived from a compilation of all amendments to the 1890 constitution prepared by Brad Chism and Michael Reeves, enlarging an earlier incomplete work by the Mississippi Legislative Reference Bureau. These compilations can be obtained from the Bureau's Jackson, Mississippi office and the Governor's office, and are also on file at the office of the *Mississippi Law Journal* in Oxford, Mississippi.) Since this computation, five additional amendments were approved. *See* McIntosh, *Succession Passes: Allain Undecided*, The Clarion-Ledger, Nov. 5, 1986, at A1, col. 1; Canerdy, *Voters Endorse Education Revenues, Retirement System*, The Clarion-Ledger at A3 Co. 1. A dramatically different total appears in the latest available edition of THE BOOK OF THE STATES (1984-85). Table I, at page 221, indicates that 123 amendments had been submitted, and 54 adopted, as of December 31, 1983. The Chism and Reeves compilation appears to be basically accurate, however.

[58] Sturm, *Constitutional Revision, supra* note 43, at 8-9; *see also* State v. Manley, 441 So. 2d 864, 865 (Ala. 1983)(act proposing new constitution to be submitted to electorate at next general election).

[59] State v. Manley, 441 So. 2d 864, 876-77 (Ala. 1983).

certain enumerated provisions of the existing state constitution be retained in any new document. In *Pryor v. Lowe*, [60] the court halted the election since no voter ratification of the process had been permitted. The court also implied (at least the dissent so thought) that the delegates chosen to rewrite the constitution had to be elected by the people. The Arkansas court particularly focused on language in the existing constitution which reserved to the people the right to "alter, reform, or abolish" the government. Through this language the Arkansas Supreme Court determined that delegates to a constitutional convention were exercising power reserved to the people. If that court's interpretation of the Arkansas Constitution is correct and the constitutional convention delegates were exercising the peoples' power, then the people must through an election approve that delegation to a convention. The court also cited a previous decision that held "the position of a delegate to a constitutional convention is derived from the power inherent in the people."[61]

The issue is not one-sided. For example, based on each state's applicable law, both Idaho[62] and Kentucky[63] have held proper the legislature's preparing a new constitution and submitting it directly to the people. Other states have followed a similar procedure and apparently no court action testing its legality was initiated.

Clearly in Mississippi the constitution does not give to the legislature the explicit right to draft an entirely new document. Mississippi Constitution Section 5 states:

> All political power is vested in, and derived from, the people; all government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole.

Mississippi Constitution Section 6 continues the theme, using quite similar language to that in the Arkansas charter:

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[60] 258 Ark. 188, 523 S.W.2d 199 (1975).

[61] *Id.*, 523 S.W.2d at 202.

[62] Smith v. Cenarrusa, 93 Idaho 818, 475 P.2d 111 (1920).

[63] Gatewood v. Matthews, 403 S.W.2d 716 (Ky. Ct. App. 1966). This decision was thoroughly examined and rejected in State v. Manley, 441 So. 2d 864 (Ala. 1983).

> The people of this state have the inherent, sole and exclusive right to regulate the internal government and police thereof, and to alter and abolish their constitution and form of government whenever they deem it necessary to their safety and happiness; provided, such change be not repugnant to the Constitution of the United States.

Without firmer support, positive or negative, in the constitution itself, the legislative drafting of an entire constitution for submission to the people is an uncertain proposition. The procedures followed to implement the 1890 constitution are not very instructive on this issue. Though the 1890 constitution was never submitted to the people for ratification, the initial selection of delegates was through popular vote.[64] Thus it is arguably consistent to say that the people had delegated their authority to draft a new constitution to the convention of 1890, and having so delegated it, there was no legal requirement that they again be consulted on the final product. On the other hand, the consistency is marginal at best. The legislature was so fearful of popular rejection of the convention that a move to submit the question of calling a convention to a referendum was defeated.[65] Thus the people were never given an opportunity to refuse to delegate their authority. The only safe conclusion is that regardless of precedents in other states, the issue of how directly the people must be involved is solely one of state law that is yet to be addressed in Mississippi.

C. Direct Action By the People: Initiative, and Otherwise?

In seventeen states voters may initiate constitutional amendments. No such authority is presently recognized in Mississippi, though in 1914 an amendment to section 33 of the constitution was approved adopting popular initiative and also referendum. The legal theory subsequently used to void the amendment was such that a revival is not inconceivable.

The journey travelled by this Progressive Movement reform in Mississippi is an arduous one. In 1912, Yazoo City newspaper-

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[64] Coleman, *The Mississippi Constitution of 1890 and the Final Decade of the Nineteenth Century*, 2 A HISTORY OF MISSISSIPPI 3, 10 (R. McLemore ed. 1973).

[65] *Id.* at 9-10.

man and first-term legislator Norman A. Mott introduced a bill in the Mississippi House of Representatives providing for local initiative, referendum, and recall within each municipality. It passed both houses, but was vetoed.[66] Earlier in the same session, six days after being sworn in, a twenty-nine year old Calhoun City farmer, teacher, and part-time law student, Walter J. Evans, introduced a related measure in the senate. Evans proposed a constitutional amendment for statewide initiative and referendum, with no provision for recall.[67] Senator Evans' proposal as finally adopted had such draconian requirements as to make it virtually unusable. It provided that if petitioned by fifteen percent of the "legal voters," a measure drafted by private citizens would be placed on a statewide general ballot, to become law by a simple majority vote. A citizens' sponsored constitutional amendment would require the signatures of twenty percent of the legal voters. In addition, petitions signed by ten percent of the voters would hold a legislative enactment in abeyance until a referendum on its desirability was held.[68]

The measure passed both houses, and was submitted to the people. All three constitutional amendments that appeared on the November, 1912 election ballot received a substantial majority from those voting on them. However, a large number of those casting ballots for candidates in that presidential election year did not bother to vote on the amendments. Under then-existing law, an amendment had to garner a majority of all votes cast in the election, and thus all three amendments failed to gain

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[66] H.R. 175, Miss. Leg. Reg. Sess., 1912 JOUR. MISS. H.R. 124. It was adopted by the house on a vote of 82 to 21. 1912 JOUR. MISS. H.R. 753. It also passed the senate 21-6. 1912 JOUR. MISS. S. 823. The measure was vetoed by Governor Brewer as being unconstitutional. 1912 JOUR. MISS. H.R. 1762-63.

[67] S. Con. Res. 9, Miss. Leg. Reg. Sess., 1912 JOUR. MISS. S. 52. The measure passed the Senate by a 29 to 6 vote. 1912 JOUR. MISS. S. 566. It passed the House by 66 to 30. 1912 JOUR. MISS. H.R. 1738-39. This resolution was then submitted to the people. Biographical information on Evans comes from THE OFFICIAL & STATISTICAL REGISTER OF THE STATE OF MISSISSIPPI 387 (1912).

[68] 1912 Miss. Laws 419. The 15%/20% of "legal voters," *i.e.*, all registered voters, is a dramatically more imposing threshold than other states' requirements that range from 8-15% of the number of voters participating in the most recent statewide election. Each state's initiative rules are detailed in Sturm & May, *State Constitutions: 1982-83,* THE BOOK OF THE STATES 211, 225 table 3 (1984-85).

ratification.[69]

On the second day of the legislative session in 1914, Representative Mott tried again. This time his measure granting voters of municipalities the power of local initiative, referendum, and recall became law and remained in effect (though several times amended) until repealed in 1950.[70] Not satisfied, Mott also introduced a new constitutional amendment. It established 7,500 signatures as the number necessary for a statewide initiative measure to appeal on the ballot, and 6,000 to require a referendum on a bill passed by the legislature.[71]

The numbers currently appear easy to attain. They certainly were less intimidating than the 15% of "legal voters" that appeared in the amendment that failed of ratification in 1912. Still, 7,500 signatures would have been approximately 6% of the votes cast in the then-most recent Democratic statewide primary, which was in 1911.[72] Mott's proposal passed both houses, and in November, 1914, by a vote of 19,118 to 8,718 (68.7%), the people adopted the initiative and referendum amendment.[73] By 1915, nineteen states had adopted similar provisions which were the centerpiece of the Progressive Movement's list of reforms. However, Mississippi and Arkansas were the only states to do so

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[69] 1914 JOUR. MISS. H.R. 102-03. The special majority requirement for ratification of an amendment was first interpreted by State *ex. rel.* McClurg v. Powell, 77 Miss. 543, 581-82, 27 So. 927, 934 (1900); *see also* State *ex rel.* Denman v. Cato, 131 Miss. 719, 734-35, 95 So. 691, 692 (1923)(court convinced that construction placed on section 273 in *Powell* was correct).

[70] House Bill 27, introduced January 7, 1914, 1914 JOUR. MISS. H.R. 41, became 1914 Miss. Laws 158. The amendments are indicated in the following various codifications: MISS. CODE ANN. §§ 6013-6023 (1917); MISS. CODE ANN. §§ 7038-7048 (1927); MISS. CODE ANN. §§ 2602-2612 (1930); MISS. CODE ANN. §§ 3769-3779 (1942); *see also* Coleman v. Lucas, 206 Miss. 274, 282, 39 So. 2d 879, 880 (1949)(qualified electors may petition for recall of municipal officials, but power to order election is exclusively with Governor). The repeal of these sections resulted from 1950 Miss. Laws 491, § 69.

[71] House Concurrent Resolution 24, introduced January 23, 1914, 1914 JOUR. MISS. H.R. 277, passed the House by a vote of 73-23, 1914 JOUR. MISS. H.R. 1227, and the Senate by 31-2, 1914 JOUR. MISS. S. 1208, and became 1914 Miss. Laws 520, at 526.

[72] There was not a contested governor's primary in 1911, but 132,401 votes were cast in the senate primary, and 129,425 for lieutenant governor. THE OFFICIAL & STATISTICAL REGISTER OF THE STATE OF MISSISSIPPI 124-25 (1912).

[73] *Id.* at 466-471. The vote is also described in State *ex rel.* Howie v. Brantley, 113 Miss. 786, 795-96, 74 So. 662, 665 (1917); the amendment was inserted into the constitution by 1916 Miss. Laws 159.

in the south. The vast majority were in the West and Midwest.[74]

Mississippi's new provision allowed proponents to present a petition on any "measure." That word was defined as "any law, bill, resolution, constitutional amendment, or any other legislative measure."[75] Thus single amendments to the constitution were explicitly permitted. It is probable that by the use of the word "resolution," the drafter also authorized petitions calling for a constitutional convention. In Mississippi a convention is called by a resolution passed by a simple majority vote in each house.[76] Thus a citizens' petition containing a similar resolution, if it received the requisite signatures, would have led to a popular vote on holding a convention. It is interesting to speculate on whether the 1890 constitution would still be in effect if the initiative had not been voided.

A test of the validity of the amendment's passage soon reached the supreme court. In *State ex rel. Howie v. Brantley*,[77] the court rejected arguments that the amendment was a nullity. A dispute existed concerning how many qualified electors participated in the 1914 election. Again, many who voted for candidates on the ballot did not vote on the nine amendments, among which the initiative was listed eighth. The court resolved the issue by finding that the amendment did receive a majority of votes cast by qualified electors.[78]

A second problem was whether the amendment violated another, now-changed, provision of section 273:

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[74] C. HAMILTON, *supra* note 66, at 135. A chart listing all states with the initiative appears in STURM & MAY, *supra* note 68, at 225. For Arkansas' initiative and referendum adoption, see Hodges v. Dawdy, 104 Ark. 583, 149 S.W. 656, 657-58 (1912).

[75] 1914 Miss. Laws 520, at 526.

[76] *See infra* notes 207-25; *see also* Goldings, *The Use of Popular Initiative Petition for a Constitutional Convention Act*, 47 MASS. L.Q. 367, 367 (1962)(initiative procedure is peculiarly appropriate mechanism for putting question of constitutional convention to people). *But see* Cohen v. Attorney Gen., 259 N.E.2d 539, 547 (Mass. 1970)(convention is improper subject for initiative petition).

[77] 113 Miss. 786, 74 So. 662 (1917); *motion to reinstate refused*, 130 Miss. 656, 94 So. 793 (1923).

[78] *Brantley*, 113 Miss. at 796-97, 74 So. at 665-66. Nine amendments were on the ballot in 1914. All received substantial majorities of votes cast on the amendments, but the initiative and referendum amendment was eighth in votes received. THE OFFICIAL & STATISTICAL REGISTER OF THE STATE OF MISSISSIPPI 476-77 (1917).

> [I]f more than one amendment shall be submitted at one time, they shall be submitted in such manner and form that the people may vote for or against each amendment separately.[79]

The court determined that the initiative and referendum were "parts of one general plan or scheme looking to a more direct control of . . . legislation."[80] Accordingly, on both counts the amendment was upheld.

The initiative and referendum amendment was inserted into the constitution in 1916. Over the next six years, apparently the only petitions with sufficient signatures concerned four constitutional amendments, three referenda, and one statute. The people approved one measure, rejected two, and the courts blocked the other five before any vote. By comparison, from 1912 when Senator Evans first introduced the initiative, through 1922 when the supreme court discarded it, the legislature proposed twenty constitutional amendments, of which thirteen were adopted.[81] The first measure under the new amendment was a referendum in 1916 that overwhelmingly rejected the recently passed game and fish laws. Under that legislation, the governor would have appointed game wardens in every county and also named a state game warden. Opponents of incumbent Governor Theodore Bilbo thought he was attempting through this measure to create a statewide, state-salaried political machine, and such arguments proved persuasive. Six years later some suspected that a desire to revive this scheme helped motivate the attack on the constitutionality of the initiative and referendum.[82] The prohibition

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[79] *Brantley*, 113 Miss. at 797, 74 So. at 666.

[80] *Id.* at 799, 74 So. at 666 (quoting Ex Parte Pfahler, 150 Cal. 71, 88 P. 270, 272 (1906)).

[81] No complete set of records was discovered. A review of the election returns for 1916 through 1922 filed with the Secretary of State, now deposited with the Mississippi Department of Archives and History, and issues of the Jackson Daily News and Daily Clarion-Ledger for the relevant dates, did not indicate any initiatives or referenda besides those listed here. The legislative proposals are detailed in the following: 1914 JOUR. MISS. H.R. 102-03; THE OFFICIAL & STATISTICAL REGISTER OF THE STATE OF MISSISSIPPI 466-77 (1917); THE OFFICIAL & STATISTICAL REGISTER OF THE STATE OF MISSISSIPPI 362-65, 408-19, 437 (1923).

[82] *Russell Replies to Absurd Claims*, Yazoo Sentinel, Oct. 27, 1922, at 1, col. 1; *A Heavy Blow*, Daily Clarion-Ledger, Oct. 24, 1922, at 4, col. 1; *Many Voters Expected to Visit Polls Today*, Daily Clarion-Ledger, Nov. 7, 1916, at 8, col. 3; *see also infra* note

referenda were also to be held at the 1916 election, but were cancelled because they attempted to allow the people to pass on legislation adopted prior to the effective date of the initiative and referendum amendment.[83] A constitutional amendment to reduce the minimum age for governor to twenty-one years lost in 1918, receiving less than 15% of the vote.[84] Another popularly initiated amendment, dealing with special appropriations by the legislature to equalize school funding, was approved in 1919 by a two-to-one margin.[85]

Opponents of such a direct role for the people in legislation would not concede defeat. An initiative that would reduce the allegedly princely compensation received by state revenue agent Stokes Robertson provided an opening for a renewed assault on the constitutionality of the initiative and referendum. This statewide official received approximately $40,000 under the existing fee system. A proposed 1922 initiative would have set $5,000 as the maximum income for the position, compared to the governor's $7,500.00 salary.[86] Five years after *Brantley*, a divided court in *Power v. Robertson*[87] reversed the earlier decision, cancelled the scheduled vote on the revenue agent's fee limit, and said the entire initiative and referendum procedure had never been properly adopted. The justice writing the opinion, George H. Ethridge, would later state that the initiative and referendum amendment was "a most far reaching and dangerous

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[83] Power v. Ratliff, 112 Miss. 88, 100-03, 72 So. 864, 867-68 (1916). Despite the supreme court's refusal in *Power* to enjoin any of the three referenda, three weeks later in Ex Parte Jones, 112 Miss. 27, 72 So. 845 (1916), the two referenda relating to prohibition were voided. *Id.* at 28-29, 72 So. at 846.

[84] THE OFFICIAL & STATISTICAL REGISTER OF THE STATE OF MISSISSIPPI 365-68 (1923). This was scornfully dubbed the "Kid Amendment" by opponents. *A gentleman . . .*, Daily Clarion-Ledger, Nov. 5, 1918, at 4, col. 1. The amendment was apparently an attempt to make Speaker of the House Martin Sennett Conner, who would be 28 that year, eligible in 1919. *W. H. Smith Announces for Governor of State*, Jackson Daily News, Sept. 23, 1918, at 8, col. 1; *Sennett Conner Issues Amendment Statements*, Jackson Daily News, Oct. 16, 1918, at 3, col. 4.

[85] THE OFFICIAL & STATISTICAL REGISTER OF THE STATE OF MISSISSIPPI, 387-90 (1923).

[86] *Many Want Revenue Agent on Salary Basis*, Daily Clarion-Ledger, Aug. 8, 1922, at 6, col. 2; *A Heavy Blow*, Daily Clarion-Ledger, Oct. 24, 1922, at 4, col. 1. The governor's salary was set by 1920 Miss. Laws 114.

[87] 130 Miss. 188, 93 So. 769 (1922).

proposition . . . . It is perhaps the worst of all the various initiative and referendum measures that have been proposed or adopted in any of the states . . . ."[88] Such anxieties were not explicitly determinative in the court's opinion, but doubtlessly they weighed heavily. Also knocked off the 1922 ballot were two popularly initiated constitutional amendments that would have relaxed mortmain restrictions.[89]

In *Power*, the court now found that the amendment had violated section 273's prohibition of more than one amendment being joined together for a single vote by the people.[90] No longer was the provision a "general plan or scheme looking to a more direct control of . . . legislation," as concluded five years earlier in *Brantley*. The dissent of Chief Justice Sydney Smith aptly summarized the basis of the court's new view:

> [A] determination of the question will depend on whether a Constitution shall be given a liberal or a strict and narrow construction.
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> . . . If the Court in the Brantley case had adopted a strict and narrow construction, such as my brethren now adopt, the amendment would have been declared void . . . . But it adopted, as it had the right to do so, and which under the rule of stare decisis should be now followed, a liberal construction, under which the amendment was necessarily held to be valid.[91]

The issue was simple: whether to read section 273, concerning the proper subjects for one amendment, narrowly or broadly. Ironically, the majority, in overturning the initiative, relied on a principle that made the issue permanently open to relitigation. The court paid brief homage to stare decisis, but then stated:

> A constitution, however, is much more important and sacred than a decision of any court . . . . Where a court misconstrues the Constitution or misjudges a case, and its attention is called

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[88] G. Ethridge, Mississippi Constitutions 609 (1928).

[89] The petitions themselves, and the Secretary of State's September 30, 1922 proclamations calling an election on the mortmain amendments, appear in the records of the Secretary of State. Official Archives of the State of Mississippi, Record Group 28, Box 190, Library, Mississippi Department of Archives & History.

[90] *Power*, 130 Miss. at 230-33, 93 So. at 775-76.

[91] *Id.* at 243-44, 93 So. at 780 (Smith, C. J., dissenting).

> to it in the proper way, it should make a correction at the earliest date possible.[92]

The dissent focused on that proposition: "as the matter now stands, no one can say with confidence whether the amendment is a part of the Constitution or not; for, unless the rule of stare decisis is to be followed, the decision here made may also be hereafter overruled."[93]

That constitutional questions are too fundamental to permit rigid application of stare decisis has frequently been insisted by the court. For example in 1879, Chief Justice James Z. George, the man frequently considered the father of the 1890 constitution, stated:

> [O]n constitutional questions, where the former decision refused a right reserved to individuals as against the power of the government, or where it impaired the powers of the people or their representatives to prevent maladministration by their officers and agents, or sanctioned an alienation by the legislature of powers conferred for the public good, I should feel little hesitation in departing from it when satisfied of its incorrectness.[94]

Written almost forty years before the controversy over the initiative and referendum, three remarks appear to be responding directly to that later debate.

A similar position was taken in 1880. If a prior construction was wrong, "it should be corrected; since, to a construction of the Constitution relating solely to a question of public administration, and which cannot involve rights of private property acquired upon the faith of the decision, the doctrine of stare decisis can have no proper application."[95]

If the 1917 decision upholding the adoption of the initiative was wrong, it certainly was not alone. *State ex. rel. Howie v.*

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[92] *Id.* at 235, 93 So. at 777.

[93] *Id.* at 245, 93 So. at 780-81 (Smith, C.J., dissenting). The author of the majority opinion, George Ethridge, seemingly recognized the potential for reviving the amendment when he wrote that he *hoped* the initiative "[would] forever remain in the grave where it now rests." G. ETHRIDGE, *supra* note 88, at 615.

[94] Lombard v. Lombard, 57 Miss. 171, 177 (1879); Rogers, *Corporations*, YESTERDAY'S CONSTITUTION TODAY 82 (1969).

[95] Beck v. Allen, 58 Miss. 143, 174 (1880)(Chalmers, C.J., concurring).

Brantley discussed the pendulum swings by the Mississippi Supreme Court in interpreting the phrase "more than one amendment." In *Brantley* the court confidently declared the end to the confusion,[96] unaware that five years later disorder would be renewed in *Power v. Robertson.* The *Brantley* court held that the solution turned upon "whether we adhere to the liberal and common sense interpretation put upon section 273 of the Constitution, in State v. Jones, . . . or whether we return to the strict and narrow interpretation put thereon in State v. Powell . . . ."[97] The court adhered to a "common sense approach." In doing so, the opinions from several other states were cited that supported the conclusion, many of which were precedents involving those states' adoption of the initiative and referendum.[98]

Of the several decisions relied upon in *Brantley* to support the adoption of the initiative and referendum as one amendment, the most thorough discussion of the issue appeared in *Gottsein v. Lister.*[99] There, the Washington court found general uniformity among the states in giving legislatures flexibility in this area. There were only two cases "which [were] regard[ed] as being opposed to the views expressed in the above-noticed decisions."[100] One such decision was from Idaho, and the other was *State ex rel. McClurg v. Powell,* [101] a 1900 Mississippi ruling. As pointed out by the Washington court, *Powell* was overruled by *State ex rel. Collins v. Jones,*[102] thereby temporarily leaving Idaho as the lone, rigid interpreter out of the twenty-nine states that then had a provision requiring not more than one amendment be submitted at the same time.[103]

In 1916, a lengthy review of the precedents was again undertaken by the Mississippi Supreme Court in *State ex. rel. Collins v. Jones.* Quoting from a Wisconsin decision, the court in *Collins* made the following observation:

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[96] *Brantley*, 113 Miss. at 797-98, 74 So. at 666.
[97] *Id.*
[98] *Id.*
[99] 88 Wash. 462, 153 P. 595 (1915).
[100] *Id.* at 601.
[101] 77 Miss. 543, 27 So. 927 (1900).
[102] 106 Miss. 522, 64 So. 241 (1914).
[103] *Id.* at 577, 64 So. at 254.

> We do not contend that the legislature, if it had seen fit, might not have adopted these changes as separate amendments, and have submitted them to the people as such; but we think, under the constitution, the legislature has discretion, within the limits above suggested, of determining what shall be submitted as a single amendment, and that they are not compelled to submit as separate amendments the separate propositions necessary to accomplish a single purpose.[104]

The safeguard served by provisions like section 273, according to *Collins*, was to prevent "incongruous matter and that having no connection with the main subject from being inserted," which would be a common legislative tactic of "loading a meritorious proposition with an independent and distinct measure of doubtful propriety."[105] On the other hand, the court thought it "obvious that an amendment may be one, and yet include several changes and incidents, all germane to its one controlling purpose."[106]

One decision cited in *Collins* that seems particularly relevant is *State ex rel. Adams v. Herried*,[107] from South Dakota. That court permitted the submission in one amendment of a change in the number of regents on the single state-wide board governing all the state colleges and universities, and also the abolition of a separate board of trustees at each institution. The *Collins* court described the objections made in that case as follows:

> [T]hat these objects are independent of each other; that either might have been adopted without adopting the other; and that there are numerous reasons why an elector might have desired one change, and not the other. The defect in this argument consists in substituting for the real object or purpose one of its

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[104] *Id.* at 546, 64 So. at 243 (quoting State *ex rel.* Hudd v. Timme, 54 Wis. 318, 11 N.W. 785, 791 (1882)).

[105] *Collins*, 106 Miss. at 550, 64 So. at 244. The Arizona Supreme Court said the purpose of a similar constitutional provision was "to prevent the pernicious practice of 'log rolling' in the submission of a constitutional amendment." Kerby v. Luhrs, 44 Ariz. 208, 36 P.2d 549, 551 (1934).

[106] *Collins*, 106 Miss. at 555, 64 So. 2d at 246 (quoting Gabbert v. Chicago R.I. & P. R. R. Co., 171 Mo. 84, 96, 70 S.W. 891, 897 (1902)).

[107] 10 S.D. 109, 62 N.W. 93 (1897).

> incidents. Control of the state educational institutions is the subject to which the proposed amendment relates . . . . The membership of such board, its powers, and the abolition of the local boards are but incidental to and necessarily connected with the object intended.[108]

What *Collins* explicitly held was that section 273 should not be read narrowly to require the legislature to break proposals into separate amendments whenever it was possible to do so. Instead, if a general object could be seen in the amendment, and if it did not contain incongruous matter bootstrapped onto an arguably more popular measure, then section 273 is no impediment. In 1917, in *Brantley*, the court used this same reasoning to hold that the initiative and referendum amendment had been validly adopted in Mississippi.

As a final principle, *Collins* held that "every reasonable presumption, both of law and fact, is to be indulged in favor of the validity of an amendment to the Constitution, when it is attacked *after* its ratification by the people."[109] A "liberal and common sense view" must be taken of the issues involving amendment procedures.[110] Quoting from an earlier Mississippi decision, the *Collins* court held "The means provided for the exercise of [the people's] sovereign right of changing their Constitution, should receive such a construction as not to trammel the exercise of the right."[111]

Notwithstanding the approach taken in *Collins*, and reaffirmed in *Brantley*, the Mississippi Supreme Court in *Power* found what it thought was a meaningful distinction between the right to initiate or require a referendum on *statutes*, and the right to initiate *constitutional amendments*. As detailed in *Brantley* in 1917, many sister states had approved the joinder of the right of initiative and referendum regarding statutes into

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[108] *Collins*, 106 Miss. at 547-48, 64 So. at 243 (quoting State *ex rel.* Adams v. Herried, 10 S.D. 109, 72 N.W. 93 (1897)).

[109] *Collins*, 106 Miss. at 553, 64 So. at 254 (emphasis added)(quoting People *ex rel.* Eder v. Sours, 31 Colo. 369, 74 P. 167 (1903)).

[110] *Collins*, 106 Miss. at 562, 64 So. at 249 (quoting DODD, REVISION AND AMENDMENT OF STATE CONSTITUTIONS 179 (1910)).

[111] *Collins*, 106 Miss. at 562, 64 So. at 248 (quoting Green v. Weller, 32 Miss. 650, 684 (1856)).

one amendment. What Justice Ethridge wished to distinguish in *Power* was that the initiative of, or referenda on, laws involved a legislative function. In contrast, "the power to change or amend the Constitution has never been delegated to the Legislature. Amendments proposing constitutional changes have never been regarded as bills which must be sent to the Governor for his approval . . . ."[112]

True, as Ethridge declared, the right to initiate a law that, if passed by the legislature, would have become final upon signature by the governor is different from initiating a constitutional amendment that is not final until voted on by the people. Still, there may be some confusion here, as the *Collins* court warned, of some of the incidents of a proposal for the central plan or object itself. Are these not different parts of a single scheme to grant the people authority over legislative measures, regardless of whether the measure is one that the governor signs, or that the people ratify?

In sum, the *Power* court found that at least eleven different sections of the 1890 constitution were affected by this amendment, those being the sections setting out what laws the legislature could or could not pass, the governor's veto authority, and the means to adopt constitutional amendments.[113] Just six years earlier, however, the same court said that it did not matter whether an amendment affected more than one section of the existing constitution[114] if it served a common purpose as opposed to different, incongruous ones. Indeed, in *State ex rel. Collins v. Jones* the court, *arguendo*, took the separate amendment concept to its absurd extreme. Section 90 of the 1890 constitution lists in separate paragraphs twenty-one categories of private or local legislation that could be passed. If the legislature proposed to abolish all the categories and permit no private or local bills, "the question arises how many amendments would be required to effectuate the change." Does the fact that some citizens might want to preserve some of the sections but not others

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[112] *Power*, 130 Miss. at 188, 93 So. at 775-76.

[113] *Id.* at 231, 93 So. at 775-76.

[114] *Collins*, 106 Miss. at 550, 64 So. at 244; *see infra* text accompanying note 115 (discussing court's analysis).

mean that twenty-one separate amendments must be submitted in order to achieve the general plan of abolishing all private and local legislation? The court said "[n]o such limitation is found in section 273 . . . and, in our judgment, no such limitation should be read into it by construction."[115]

Whatever the merits of the *Power* decision, there is something vaguely disingenuous about its final sentence preceding the statement that the lower court's decision is affirmed: "[n]othing in this opinion modifies or affects the case of State ex rel. Collins v. Jones . . . ."[116] The *Collins* court made a more candid observation about two other precedents in this area:

> [T]he [State v.] Powell case does not in terms either overrule or criticize the decision of the court in the former case [Green v. Weller]; yet no man can read these two decisions in reference to the exact question here involved and not be impressed with the idea that they breathe an altogether different spirit . . . .[117]

Power v. Robertson made distinctions and found semantic differences that were considered irrelevant in *Collins*. Far from neither modifying nor affecting *Collins*, *Power* snuffed out the "altogether different spirit" that *Collins* breathed.

Reaction to *Power v. Robertson* in some quarters was one of outrage, while others applauded. A Jackson newspaper's explanation, doubtlessly too partisan, was that the incumbent governor's political friends were making so much money off the State Revenue Agent's emoluments, which would have plummeted had voters supported the 1922 initiative, that the issue became irretrievably politicized. Indeed, the attempt to limit the office's fees and also to audit its accounts had begun in the previous legislative session, but was successfully blocked by Governor Lee Russell.[118] However, Robertson's, and the governor's, supporters al-

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[115] *Collins*, 106 Miss. at 570, 64 So. at 251.

[116] *Power*, 130 Miss. at 189, 93 So. at 777.

[117] *Collins*, 106 Miss. at 578, 64 So. at 254.

[118] *No Time for Neglect*, Daily Clarion-Ledger, Oct. 31, 1922, at 4, col. 1; *A Heavy Blow*, Daily Clarion-Ledger, Oct. 24, 1922, p. 4, col. 1; *Revenue Agent Loses Fight on Salary Vote*, Jackson Daily News, Sept. 30, 1922, at 1, col. 1; *Robertson Gets Congratulations*, Yazoo Sentinel, Apr. 3, 1922, at 1, col. 1.

leged the initiative to lower the salary was a blatant fraud by a few insurance companies and agents whose accounts were being too closely monitored for their liking.[119] A more fundamental explanation is that Progressive sentiment had faded in Mississippi, not surprisingly since in most of the south it had never gained even short-term dominance. Besides general opposition to the principle of initiative and referendum, a more specific and an eminently valid complaint—though not one that could legally have voided the amendment—was that this was not a well written measure, and contained ambiguities and oversights that troubled some legal scholars.[120]

The constitutional amendment overwhelmingly adopted in 1919, providing for equalized school funding, was also effectively voided by the *Power v. Robertson* opinion.[121] The State Superintendent of Education and some newspapers called the results "disastrous" and immediately urged a special session of the legislature.[122] Stokes Robertson, the revenue agent whose aggressive defense of his income caused this turmoil, was defeated in the 1923 primary.[123] For the next few years there were efforts to re-enact the initiative and referendum, but they gained little

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[119] *Stokes Robertson's Sweeping Victory in Referendum Case*, Yazoo Sentinel, Oct. 23, 1922, at 1, col. 5; *Trying to Destroy Stokes Robertson*, Yazoo Sentinel, Oct. 11, 1922, at 2, col. 1.

[120] G. ETHRIDGE, *supra* note 88, at 607-15; Opinion of Judge W.H. Potter, Robertson v. Power, Cause No. 5011, Hinds County Circuit Court. The order is recorded in Minute Book 18, Page 568. The court file no longer exists, but the opinion is printed in full in *State Revenue Agent Wins Sweeping Victory*, Jackson Daily News, Oct. 9, 1922, at 6, col. 3.

[121] Miller v. State *ex rel.* Russell, 130 Miss. 564, 581, 94 So. 706, 708 (1923).

[122] *Court Decision May Necessitate Special Session by Legislature*, Daily Clarion-Ledger, Oct. 25, 1922, at 6, col. 3; *Governor is Noncommittal about Legislative Session to Clarify School Muddle*, Vicksburg Evening Post, Oct. 25, 1922, at 1, col. 4; *High Court Decision Demoralizes Schools*, Jackson Daily News, Oct. 24, 1922, at 1, col. 2; *Public School System Struck Heavy Blow by Court Decision*, Daily Clarion-Ledger, Oct. 24, 1922, at 1, col. 1.

[123] The victor's (W. Jones Miller) sole issue was Robertson's by-then $75,000 income; Miller pledged if elected to push for the same $5,000 ceiling as was sought by the 1922 initiative. *The Voice of the People*, Jackson Daily News, Aug. 12, 1923, at 6, col. 2. Governor Russell stoutly defended Robertson. *Governor's Message*, 1924 JOUR. MISS. H.R. 59, 92-98; *The Unholy Trio of Treachery: Robertson, Russell, and Franklin*, Jackson Daily News, Aug. 5, 1923, at 10, col. 1.

support.[124]

The issue of what is more than one amendment did not reappear in the Court prior to 1959. Section 273 was amended that year to allow for several amendments to be presented as one if they related to the same subject matter.[125] Ironically, the other problem that faced the 1914 approval of the initiative (did the amendment receive a majority of all legal votes cast in that election?) was also removed as a requirement for future amendments in 1959. Now it is only necessary that a majority of those voting on the amendment itself favor its adoption.

Power v. Robertson has never been explicitly followed on this issue in an opinion from any other state. Among the references to the case was by a Kentucky justice, who in dissent argued against allowing the joinder into one amendment of a repeal of statewide liquor prohibition and the restoring of local option; the majority found the joinder acceptable and ignored *Power*.[126] On the other hand, the Ohio Supreme Court in 1967 stated that "Most states are liberal in interpreting what such a single general purpose or object may be" that would allow measures to be joined into one amendment.[127] Cited were cases from six states supporting this proposition, while *Power* and a case from Arizona were cited for contrast.[128]

An exhaustive annotation of the cases was published in which decisions from eighteen different states were collected. The conclusion was that:

> [T]he rule has been laid down that a constitutional amendment embracing several subjects, all of which are germane to the general subject of the amendment, will, under such a requirement, be upheld as valid, and may be submitted to the people as a general proposition.[129]

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[124] *See, e.g.*, 1926 Jour. Miss. H.R. 279; 1924 Jour. Miss. H.R. 116, 403.

[125] 1959 Miss. Laws 78.

[126] Curry v. Laffoon, 261 Ky. 575, 88 S.W.2d 307, 309, 313 (1935)(Ratliff, J., dissenting).

[127] State v. Brown, 10 Ohio St. 2d 139, 226 N.E.2d 116, 121 (1967).

[128] *Id.* at 121 n.7. The Arizona case was Kerby v. Luhrs, 44 Ariz. 208, 36 P.2d 549 (1934).

[129] Annot., 94 A.L.R. 1510, 1511 (1935).

The Mississippi cases on the subject were somewhat disparagingly introduced with the statement that the "varying decisions that can be made, notwithstanding the adherence to the same fundamental principle, are well exemplified in Mississippi."[130]

That seems an adequate and telling summation of the supreme court's experience with section 273.

The initiative and referendum amendment was put in its grave sixty-five years ago. Though some may question its burial, few would dispute that the drafters in 1914 failed to write with an eye for the future. The clearest anachronism is the low threshold of 7,500 signatures; other deficiencies in the enactment also exist. If the amendment is ever revived, it also should simultaneously be modernized.[131]

Outside of the dormant initiative, is there any other vehicle for a direct popular call for a new constitution in Mississippi? At first reading, there is an explicit authorization. Section 6 of the 1890 state charter states:

> The people of this state have the inherent, sole, and exclusive right to regulate the internal government and police thereof, and to alter and abolish their constitution and form of government whenever they deem it necessary to their safety and happiness; Provided, such change be not repugnant to the Constitution of the United States.[132]

The origin of this language is evident. The Declaration of Independence used quite similar language to legitimize its revolutionary statements.[133] Almost identical declarations appeared in the state constitutions of 1817[134] and 1832,[135] but not in the state constitution of 1869.

What does a statement of rights which includes the right to

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[130] *Id.* at 1518.

[131] For example, the mechanism to revive might be with petitions to place on the ballot a new amendment that clarifies and updates the procedures. The courts would just decide whether the 1914 amendment would be resurrected, while the people would then have the prerogative whether to improve it.

[132] MISS. CONST. of 1890, art. 3, § 6.

[133] The Declaration of Independence para. 2 (U.S. 1776).

[134] MISS. CONST. of 1817, art. 1, § 2.

[135] MISS. CONST. of 1832, art. 1, § 2; *see* Alcorn v. Hamer, 38 Miss. 652 (1859)(interpreting 1832 state constitution).

alter and even abolish the constitution mean in practical terms? Historically speaking, it has meant almost nothing. Fittingly for the present discussion section 6 has been used to sanction voter approval of an amendment that arguably covered more than one subject. As mentioned earlier in *State ex rel. Collins v. Jones*,[136] the court distinguished the legal sufficiency of an amendment once it had been approved by the people, from the rules applicable before the popular vote. Once the people have spoken, section 6 means that their will should be enforced even if some technical defects in the submission existed.[137]

The question of whether section 6 authorizes direct popular action is a complicated one. A citation of issues must suffice for the present as to some parts of the inquiry. Much like the preamble and certain other statements of principle, language similar to section 6 in various state constitutions is at times said to have no independent force, but to be merely hortatory.[138] A point of disagreement between the states is whether enumerating certain procedures for amending a constitution necessarily excludes the legality of others not described.[139] The Mississippi Constitution of 1890 only refers to amendments by the legislature. As fully described below, this has not prevented legislative calls for conventions.[140] In other states, language similar to the "amend or abolish" phrase in section 6 has occasionally been said not to be a statement of *legal* rights, but a recognition of *revolutionary* ones.[141]

Section 6 has not been interpreted as to whether it actually authorizes a popular call for a convention. Does it mean, for example, that the people have this right, but only through their elected representatives? If so, then unless those representatives

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[136] 106 Miss. 522, 560, 64 So. 241, 248 (1914).

[137] *Id.* at 560, 64 So. at 248.

[138] *See* Jacobsen v. Massachusetts, 197 U.S. 11, 26 (1905); Albritton v. Winona, 181 Miss. 75, 96, 178 So. 799, 803 (1938); *see also* 16 Am. Jur. 2d *Const. Law* § 235 (1979).

[139] *See* J. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS 563-74 (1887); *see also* Board of Supervisors v. Attorney Gen., 229 A.2d 388, 402 (1967); In re Opinion to the Governor, 55 R.I. 56, 178 A. 433, 446 (1935).

[140] *See infra* notes 191-194 and accompanying text.

[141] *See* J. JAMESON, *supra* note 139, at § 232-46 (1887). *But see* In Re Opinion to the Governor, 55 R.I. 56, 178 A. 433, 455 (stating that the power to amend includes the right to engage in peaceful as well as revolutionary means of alteration).

agree, there will be no alteration or abolition of the constitution.

In 1841, a large number of Rhode Island citizens, having become disgruntled with the current government, took upon themselves the summonsing of a constitutional convention.[142] In that small state it was possible, and proof was adduced that it did occur, that a majority of the voters attended town meetings and approved the holding of a convention and the drafting of a new document. Following the convention's deliberations, an election was called by these delegates. Again, no legislation was passed authorizing the election. A clear majority of the state's qualified voters approved. This "People's Convention" nonetheless was declared invalid by state courts, and those decisions were upheld, though not on the merits, by the United States Supreme Court.[143] No other example of such direct popular action has been discovered. Even the colonies during the Revolution of 1776, and the Confederate states in 1861, operated through arguably regular state governmental procedures when they separated from a central government.[144]

Is there not, however, an appropriate middle ground between revolutionary action and suffering legislative indifference? If there is, it is probably through the following reasoning. Section 6 reserves to the people the right to alter their constitution,[145] and not just their government. This is not mere revolutionary rhetoric—altering the constitution can hardly be said to contemplate revolution. By comparison, the Mississippi Constitutions of 1817 and 1832 had nearly identical language, but spoke only of a right to "alter and abolish their form of government." By adding the right to alter the constitution, arguably the 1890 drafters were giving additional, more concrete meaning to the provision. Kentucky has a similar provision. In *Gatewood v. Matthews*,[146] the Kentucky Court of Appeals considered the impact of language like that of section 6 on the issue of whether

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[142] For a thorough discussion of these events, see J. JAMESON, *supra* note 139, at § 226-28 (1887).

[143] *See id.* at § 228-39.

[144] W. DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS 1-30 (1910); *see also* J. JAMESON, *supra* note 139, at 125-69, 247-56 (1887).

[145] *See supra* note 132 and accompanying text.

[146] 403 S.W.2d 716 (Ky. Ct. App. 1966).

specifically described provisions for amending the constitution excluded all other provisions.[147] Using language from the Rhode Island Constitution, the Kentucky court found that their own constitution could be amended by any "explicit and authentic act of the whole people."[148] The court rejected the notion that Kentucky's constitutional analog to article 6 "has been preserved throughout all these years as a mere relic, a museum piece without meaning or substance as a viable principle of free government."[149] Nothing else in the constitution could limit the fundamental rights there established. The referenced Rhode Island decision established that any "explicit and authentic act," if not inconsistent with the constitution, would be valid.[150] An additional rule comes from the 1856 Mississippi decision of *Green v. Weller*[151] later quoted approvingly in *State ex rel. Collins v. Jones*.[152] The question in *Green* was whether the requirement of a two-thirds vote by each legislative house before submitting a constitutional amendment to the people meant two-thirds of those voting, or two-thirds of the entire membership.[153] The court was not confident of the intent of the requirement, but concluded that it was not a significant question.[154] The act of the legislature was not final, and only after the people had exercised "their sovereign right of declaring whether they will change their Constitution" would the measure become final.[155]

> There is nothing in the nature of the submission which would cause the free exercise of it to be obstructed, or that could render it dangerous to the stability of the government; because the measure derives all of its vital force from the action of the people at the ballot box, and there can be danger in submitting, in an established form, to a free people, the proposition whether they will change their fundamental law. *The means provided for the exercise of their sovereign right of changing*

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[147] *Id.* at 719-20.
[148] *Id.* at 719 (quoting In Re Opinion to the Governor, 55 R.I. 56, 178 A. 433, 439).
[149] *Gatewood*, 403 S.W.2d at 720.
[150] *Id.* at 720-21.
[151] 32 Miss. 650 (1856).
[152] *Collins*, 106 Miss. at 578-79, 64 So. at 254.
[153] *Green*, 32 Miss. at 678-84.
[154] *Id.*
[155] *Id.* at 683.

> *their Constitution, should receive such a construction as not to trammel the exercise of the right. Difficulties and embarassments in its exercise are in derogation of the right of free government, which is inherent in the people . . . .*[156]

The basic principles emerging from the preceding discussion can be summarized rather simply. The fact that the Mississippi Constitution only spells out one method of revision—amendments passed by the legislature—does not preclude other methods. The people have retained the right to alter and abolish the constitution by an authentic and explicit act. The method employed must not be inconsistent with the constitution itself, and must be sanctioned by some provision in the constitution or by statute. However, the available methods of exercising the right to alter the constitution should not be rigidly or narrowly defined.

Under the broad principles stated herein, there is at least one expression of the popular will that might have to be recognized under section 6. The expression, though, is so difficult as to be virtually impossible to succeed. If the legislature will not schedule a referendum,[157] then a write-in vote, at a general, state-wide election for candidates may operate as a valid expression of the popular will. For such a write-in vote to be enforceable as an authentic act of the people exercising their retained rights under section 6, a majority participating in the election must have declared in favor of a specific, citizen-drafted amendment or a constitutional convention resolution.

The electorate's right to write-in candidates not nominated by any party was given constitutional protection in *Mayor v.*

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[156] *Id.* at 684 (emphasis added).

[157] A referendum ordered by the legislature would be the most direct way for the retained rights under section 6 to be exercised. The following part of this article discusses Mississippians' rights if the legislative branch does not afford this opportunity. Some question might exist under Alcorn v. Hamer, 38 Miss. 652 (1859), as to whether a referendum would even be proper. However, that case refuses to allow a referendum on run-of-the-mill legislation because the authority to decide such matters has been delegated by the people entirely to their government. *Alcorn*, 38 Miss. at 655-56. Quite the contrary, section 6 has specifically reserved to the people authority to decide constitutional issues, and a referendum on holding a convention almost certainly would be permitted. Most states *require* a referendum before a convention can be held. *See* Sturm & May, *supra* note 68, at 226.

State.[158] Nonetheless, that protection was considerably circumscribed in later decisions. In *McKenzie v. Boykin*,[159] the court upheld a general statute permitting write-ins only if the nominated candidate had died.[160] *McKenzie*, however, affirmed the 1914 case of *State v. Ratliff*, [161] which sanctioned a write-in of someone properly nominated for office but who was nonetheless left off the ballot.[162] This means that the names on the ballot, plus the right to write-in a substitute for a deceased candidate, do not necessarily constitute the complete list of individuals for whom votes can be cast. The importance of *Ratliff* arises from an easy analogy to the present issue. The people, under section 6, always have the retained right to vote to "alter or abolish" the constitution, just as in *Ratliff* the people had the right to vote for the properly nominated candidate who was left off the ballot.[163] If the right to vote for someone or something exists, having the name left off the ballot does not prevent a write-in.

Of even more significance, the *McKenzie* decision did not overrule *Mayor*, but gave it an interpretation that directly impacts the section 6 issue. In *Mayor*, the relevant statute solely provided for candidates to be placed on the ballot through party nominations.[164] The *McKenzie* Court summarized the effect of *Mayor* as follows:

> [Since the statute] . . . did not provide for any other method . . . than through party nominations, . . . the voter retained undoubtedly the right to write the name of his choice upon the ballot, for the voter *has a constitutional right to express his choice, and if no other reasonable method is provided by law, he has the right to write the name of his choice on the ballot.*[165]

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[158] 102 Miss. 663, 687, 59 So. 873, 875 (1912).

[159] 111 Miss. 256, 71 So. 382 (1916).

[160] *Id.* at 261, 71 So. at 384. The relevant statute is found at MISS. CODE ANN. § 23-15-365 (Supp. 1986).

[161] 108 Miss. 242, 66 So. 538 (1914) (construed in *McKenzie*, 111 Miss. at 262, 71 So. at 385).

[162] *Ratliff*, 108 Miss. at 256, 66 So. at 542.

[163] *Id.*

[164] *Mayor*, 102 Miss. at 686-87, 59 So. at 875.

[165] *McKenzie*, 111 Miss. at 262, 71 So. at 385 (emphasis added).

Nothing could more aptly state the circumstances under section 6. Though citizens have a constitutional right to alter or amend the constitution, no current statute authorizes direct action by the people, such as with a petition to place the issue of constitutional revision on the ballot. In *Mayor* the court ruled that a write-in was proper because the applicable statute had not provided for nominations through petition.[166] Also in *McKenzie*, as under section 6, the court stated that "if no other reasonable method is provided by law, [the voter] has the right to write . . . his choice on the ballot.[167] The constitutional right at issue in *Mayor* arose under section 250, which had been interpreted to mean that citizens were entitled to vote for any candidate they wanted, whether appearing on the ballot or not. There has been considerable weakening of that interpretation of section 250.[168] Nonetheless, the fundamental principle is the same even if it is no longer applicable to section 250. If a voter has a right under the constitution to express a choice, and if no other reasonable method is provided by law, then under *Mayor* as interpreted in *McKenzie v. Boykin*, there is a right to write in that choice on the ballot.

Under this reasoning, a valid write-in could solely deal with altering or even abolishing the constitution, as it is only that right that the people have expressly reserved. Thus, this is no carte blanche for write-in votes on other initiatives.

Assuming a write-in is proper, in what form would it take? Would detailed descriptions of the mechanics of the desired constitutional convention, or of an amendment, have to be written in verbatim by each voter? Cases appear from many states indicating that the intention of voters who write-in names should be construed liberally.[169] The use of a last name only, misspellings, and other shortcomings are to be given effect if the intention is clear under the circumstances. Of particular cogency are cases finding that if a particular write-in candidate had been campaigning or had otherwise gained notoriety for the office,

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[166] *Mayor*, 102 Miss. at 686-87, 59 So. at 875.

[167] *McKenzie*, 111 Miss. at 262, 71 So. at 385.

[168] *McKenzie*, 111 Miss. at 263, 71 So. at 385 (Smith, C.J., concurring).

[169] Annot., 86 A.L.R. 2d 1025 (1962); *see also* 29 C.J.S. *Elections* § 180 (1965); 26 Am. Jur. 2d *Elections* §§ 268-271 (1932).

variations in the writing of the name were less significant and the intention of the voters was easier to decipher.[170] A proposal written in adequate detail might therefore be prepared by proponents of a convention or other constitutional measure and be filed with an official such as the Secretary of State. Such a proposal would be given an identifying name, and voters would only need to write in that they favored the named proposal. Alternatively, if the write-in effort is for a constitutional convention, it might be sufficient for voters to state "favor constitutional convention in 1988" or some other date. If a majority participating in the election so voted, the legislature might then be required to establish the mechanics for the convention.

Write-in campaigns are notoriously futile, especially on a state-wide level. Thus even if this modest proposal is a fair interpretation of the opportunities section 6 provides, in practical terms it is unlikely ever to lead to constitutional revision. At most it might demonstrate significant popular support for the issue. Nonetheless, if the retained right under section 6 to alter the constitution is to be meaningful and not merely a museum relic, then a write-in vote on the question is one of the few authentic, explicit acts that is imaginable if the legislature does not agree to order a referendum and the initiative is not revived.

D. Constitutional Convention

"Probably no governmental institution is more uniquely American than the constitutional convention, which is the oldest, best known and the traditional method for extensive revision of an old constitution or writing a new one."[171] Through 1981, at least 230 state constitutional conventions have operated in the United States; thirty-one conventions were called between 1951 and 1981. In that period, seven conventions resulted in constitutions that were rejected by the voters.[172] Some of these

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[170] *Id.; see, e.g.*, Dupin v. Sullivan, 355 S.W.2d 676, 678 (Ky. 1963)(circumstances surrounding election are relevant in determining voter intent); Fitzsimmons v. Wilks, 25 Cal. App. 56, 142 P. 892, 893 (1914)(evidence of circumstances surrounding election is admissible).

[171] Sturm & May, *supra* note 6, at 120.

[172] *Id.* at 120-21.

stillborn constitutions were considered by many experts to be among the best offered in modern times. In the last twenty-five years only one southern state, Arkansas in 1970 and again in 1980, has rejected a convention prepared constitution, while New York in 1967, Rhode Island and Maryland in 1968, New Mexico in 1969, and North Dakota in 1972 did likewise.[173]

A review just of the southern experience with constitutional revision within the last twenty-five years shows that ten of the eleven states of the old Confederacy have proposed entirely new constitutions in that period.[174] Mississippi has stood alone in avoiding modernizing its basic document. Of these ten states, however, only Arkansas, Louisiana and Tennessee chose the route of a popularly elected constitutional convention. The other seven states initially used commissions and then the legislature revised these efforts and submitted them to the people. Two of these documents were rejected, one being commission/legislature prepared, and the other convention-drafted. The others were accepted by the people. No vote, as has already been explained, was held in Alabama because the supreme court voided the process.[175] Thus quantitatively, constitutional commissions with subsequent legislative revision have been the norm. A closer look, however, reveals that many of the legislature-prepared constitutions were not all that new.

Seven southern states used a commission in the period between 1965 and 1982, and then turned that body's draft over to the legislature for revision. Many observers complained that in most cases only modest change resulted. For example, the following criticisms were made about the 1968 Florida Constitution:

> That several vitally important subjects were completely omitted, that restrictions were placed on local government which would "make its adequacy questionable . . . in the next few years," and that generally "it simply pulled the old existing provisions together in a somewhat reorganized fashion, im-

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[173] *Id.* at 121.

[174] Southwick, *State Constitution Revision: Mississippi and the South*, 32 MISS. LAW. 21, 21-25 (Nov.-Dec. 1986).

[175] *Id.* at 33; *see also supra* notes 58, 59 and accompanying text.

> proved and corrected the general composition and syntax to some extent, and added very little new material or powers." Indeed, that comment went on "one cannot but conclude that if Florida earlier needed a new state constitution . . . it still [stood] in need of one after the convention had adjourned in 1968.[176]

A listing of the proposals submitted by the Florida study commission, but which were not adopted by the legislature, included matters currently at issue in Mississippi: streamlining the judiciary, and giving the governor power to appoint cabinet members who previously were elected.[177]

A North Carolina revision in 1970 was even more clearly limited. There, all that was attempted was an editorial revision of the existing document, without substantive change.[178] In Virginia, an eleven member commission prepared a proposed document that affected "every major area of the constitutional system . . . ." The Virginia General Assembly met in special session in February, 1969 to act on the commission's report. After seven weeks, major changes in the initial proposals were made. Rejected by the assembly were such matters as executive initiative in reorganizing the executive branch, most recommendations for local government changes, and biennial sessions of the general assembly.[179] Professor Larry Sabato described the Virginia effort as modest, but the best that could be achieved in the political environment existing in the general assembly. He believed a convention would be the procedure if a rewrite were again attempted.[180]

An even more fruitless effort was conducted in Texas in

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[176] YARGER, STATE CONSTITUTIONAL CONVENTIONS 1959-1975: A BIBLIOGRAPHY xxix (1975)(quoting DAUER, DONOVAN & KRAMMERER, SHOULD FLORIDA ADOPT THE PROPOSED 1968 CONSTITUTION? AN ANALYSIS 3-4 (1968)).

[177] Bebout, *State Constitutions and Constitutional Revision 1965-67,* THE BOOK OF THE STATES 11 (1968-69).

[178] Sturm, *State Constitutions and Constitutional Revision, 1970-71,* THE BOOK OF THE STATES 3, 9 (1972-73).

[179] Sturm, *State Constitutions and Constitutional Revision, 1967-69,* THE BOOK OF THE STATES 10-11 (1970-71).

[180] Address by Professor Larry Sabato, in A CONTEMPORARY ANALYSIS OF MISSISSIPPI'S CONSTITUTIONAL GOVERNMENT: PROCEEDINGS OF A FORUM 49-50 (D. Brammer and J. Winkle eds. 1986).

1974 and 1975. There, a draft constitution had been prepared by two previous study commissions. The legislature convened itself in special session to prepare a final document. The political rancor within the legislature, and the resulting popular distrust over the final product caused overwhelming defeat for the constitution at the polls.[181]

If this is indicative of at least the southern experience, then the possibility of only cosmetic revision if the Mississippi Legislature drafted a constitution is evident. It is fair to ask, then, what the track record is for convention drafted constitutions. There, rather different problems have arisen, starkly revealed when the voters defeat a new constitution. Running as a thread through all the explanations for the occasional voter rejection is the fear that the convention-prepared document changed too much in the fundamental state order. Even when most political and governmental factions support the document, as was the case in Arkansas in 1970 and 1980, and in Maryland in 1968, voters still have rejected a new constitution if some interest group was able to depict it as being radical or fatally flawed in some respect. What can go wrong with an almost universally acclaimed convention and resulting constitution is best exemplified by the 1968 experience of Maryland.[182]

From 1965 until 1967, a gubernatorially appointed commission studied the need for constitutional change in Maryland and finally proposed a new document.[183] The voters approved holding a convention by an overwhelming margin in 1966. After a declaratory judgment issued by the state's highest court held that legislators could be convention delegates, a nonpartisan election for those delegates was held in June, 1967. One observer felt that those elected "were in most instances the best qualified

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[181] Texas Constitutional Revision Commission, A NEW CONSTITUTION FOR TEXAS iii-iv (1973); Sturm, *State Constitutions and Constitutional Revision, 1974-75*, THE BOOK OF THE STATES 161, 170 (1976-77) [hereinafter cited as Sturm, *State Constitutions*].

[182] This review of Maryland's experience comes from an article written by an individual who was a member of Maryland's Constitutional Convention during 1965 and 1967, and secretary to the constitutional convention of 1967 and 1968. *See* Martineau, *Maryland's 1967-68 Constitutional Convention: Some Lessons for Reformers*, 55 IOWA L. REV. 1196 (1970).

[183] *Id.* at 1198-1202.

of the candidates and represented virtually every segment of Maryland." All the members of the gubernatorial commission that filed were elected, but only eleven state legislators were chosen.[184]

The former chairman of the gubernatorial commission was elected president of the constitutional convention. The president was given substantial authority which, ably exercised, considerably smoothed the deliberations of the convention. The convention was divided into committees, with the chairmen and members selected by the convention president.[185]

From September 12, 1967 to January 12, 1968, the convention worked on a draft to submit to the people. Major items of contention that appeared in the final proposal included a right to work provision, lowering the voting age from 21 to 19, increasing the number of signatures required before a law had to be submitted to popular referendum, and reducing the size of the legislature. A major similarity to the current Mississippi debate was the decision that the governor should have substantially increased powers to administer the executive branch. Most notably, all heads of principal departments of the state government and all directors and members of boards and commissions would be appointed by the governor. In the judiciary article, a merit selection plan similar to that proposed by the Mississippi Constitutional Study Commission was adopted. The governor was required to name judges from a list prepared by a nominating commission, and after a short term that new appointee would be subject to voter approval or disapproval. An attempt to make local government more efficient and less hide-bound by historical but now illogical boundaries resulted in counties being made the principal unit of local government.[186]

After completion of the draft constitution, the almost universal press reaction joined praise for the new document with assurance that it would be approved overwhelmingly.[187] However, when the referendum on the document was held four

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[184] *Id.* at 1203-07.

[185] *Id.* at 1208-09.

[186] *Id.* at 1210, 1213-22.

[187] *Id.* at 1222-23.

months later, the constitution met with defeat by a 56% to 44% margin.[188] Explaining this rejection is complicated by the variety of controversial provisions in the new state charter. Every one of the reforms achieved by the new constitution created opposition: smaller communities were concerned about regional government; some individuals were worried about an overly powerful executive; and the reduction in elective offices did not appeal to many voters.[189]

The preparer of a vote analysis felt that the constitution was too complicated for the average voter to understand, a conclusion reached because the constitution did well only in precincts with a high education and income level, and fared poorly in precincts where education and income were low. An additional explanation to other observers was that the constitution attempted too many reforms, many of which, though desirable to some groups, created too many targets. Included in one list of minor reforms that sabotaged the larger ones were lowering the voting age, making it more difficult to petition a law for referendum, authorizing regional governments, and eliminating mention of certain elective offices in the constitution even though it was virtually assured the legislature would create them.[190]

Maryland's dreary experience with constitutional revision perhaps set back efforts in other states for a time. Nevertheless, it cannot be denied that constitution reform has to a large extent regained its momentum. The price that may have been paid to restart the process and achieve success in other states, however, was to shun dramatic change in a new constitution. The end result has been a less thorough, and consequently less controversial, reform being proposed.

Mississippi is one of nine states that does not have a specific provision in its constitution for calling a convention.[191] Authority for the call is nonetheless considered implied in state law. The supreme court addressed the issue soon after the adoption

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[188] *Id.* at 1224.

[189] *Id.* at 1228-29.

[190] *Id.* at 1229-31.

[191] Sturm, *State Constitutions and Constitutional Revision, 1982-83*, THE BOOK OF THE STATES 226 table 4 (1984-85).

of the 1890 Mississippi Constitution. In *Sproule v. Fredericks*,[192] the court made the following observations:

> It will be remembered that the case at bar is free from the difficulties which are supposed by some writers to arise out of a failure or refusal of a constitutional convention to yield to the direction of the legislature which summoned it, that the constitution framed shall be submitted to the people for ratification. The act of the legislature which provided for the assembling of the constitutional convention of 1890 declared that the end sought to be attained, the work to be done, was the revision and amendment of the constitution of 1869, or the enactment of a new constitution; and it did not attempt to limit the powers of the convention by imposing, or seeking to impose, upon that sovereign tribunal the mere legislative will that the constitution enacted should be submitted to the people for ratification. We have simply the case of the constitutional convention enacting a new constitution, and putting it into effect without an appeal to the people, in strict conformity to the legislative call which assembled it. We have spoken of the constitutional convention as a sovereign body, and that characterization perfectly defines the correct view, in our opinion, of the real nature of that august assembly.[193]

After pointing out this basic character of the state constitution and allowing for a convention to be called by the legislature, the court then made some sweeping proclamations about the authority of a state constitutional convention in Mississippi. In so doing, it referred to no provision of the 1869 constitution under which the legislature acted in calling the 1890 constitutional convention, nor to the 1890 constitution itself:

> [The constitutional convention] is the highest legislative body known to freemen in a representative government. It is supreme in its sphere. It wields the powers of sovereignty, specially delegated to it, for the purpose and the occasion, by the whole electoral body, for the good of the whole commonwealth. The *sole limitation upon its powers is that no change in the form of government shall be done or attempted.* The spirit of

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[192] 69 Miss. 898, 11 So. 472 (1892).

[193] *Id.* at 903-05, 11 So. at 474.

> republicanism must breathe through every part of the framework, but the particular fashioning of the parts of this framework is confided to the wisdom, the faithfulness, and the patriotism of this great convocation, representing the people in their sovereignty. . . . [The convention], by custom and the universal consent of the people, has been regarded as the repository and executor of the powers of sovereignty. . . .[194]

It is upon the "custom and the universal consent of the people" that the court based its characterizations of a convention. These would seem equally applicable under the 1890 constitution, which sets no guidelines for the calling of a convention, as there were under the 1869 document.

If Mississippi is to use a convention, what are the mechanics? Though a constitutional convention is generally perceived as a fairly straightforward and simple concept, in fact there are many variations to the central theme. The first variable, which was discussed in the *Sproule* controversy, concerns whether the voters should be involved in decision-making. Do they elect the delegates, and, in addition, do they approve the final proposal submitted by the convention? If they are called upon to ratify, do they do so article by article, or the entire constitution at one time? Modern political realities suggest that what was done in 1890 could not be repeated today, and the people would not only elect the delegates but also vote on the final document. Phased constitutional revision is a minor current trend. In the 1970's, the states of California, Minnesota, Nebraska, Ohio, South Carolina, South Dakota, and Utah all presented to the voters a new constitution in stages.[195] One election would therefore not present the voters with the entire new constitution to consider, but only, for example, the articles on a new judicial system. The failure of one controversial section to pass would not therefore necessarily affect the ability of others to be adopted and enacted.

A common feature of constitutional conventions is to elect delegates from existing state house of representative districts.[196]

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[194] *Id.* (emphasis added).

[195] Sturm, *supra* note 6, at 4.

[196] *See* Graves, *supra* note 4, at 43-44 table I; Note, *State Constitutional Conventions: Limitations on Their Powers*, 55 IOWA L. REV. 244, 257 (1969). In fact, this was the

Such a procedure uses the already drawn lines of a fairly large body (122 members in Mississippi). It has been argued in several states that legislators themselves should be ineligible to serve in a constitutional convention, with separation of powers arguments being proposed. Those have apparently been unsuccessful in each case, usually because the constitutional convention is held to be no part of any of the three branches of government, nor for that matter, a constituent part of the existing state government at all.[197]

The final variant that will be mentioned is the possibility of structuring the subject matter that the constitutional convention will consider.[198] There are two quite different purposes for a limited convention. The first, which is widely used in Tennessee, looks to having the constitutional convention consider only a few specific issues that are considered ripe for reform. Tennessee has held five limited conventions beginning in 1952, with the most recent in 1977. The convention must first be approved by voter referendum, and delegates are then elected from the house districts. The latest convention considered thirteen subject areas, ranging from such matters as the dates for legislative sessions and gubernatorial inauguration, to homestead exemptions, school desegregation, and racially mixed marriages.[199]

The other kind of "limited convention" is actually quite different from the Tennessee experience. In this second form, the entirety of the constitution is open for revision except for a few subjects. In Louisiana in 1973, such a convention was called with three issues otherwise proper for the convention being excluded from the call. The capital could not be moved from Baton Rouge, governmental indebtedness could not be impaired, and

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very procedure used for the selection of delegates to the constitutional convention of 1890 resulting in the creation of Mississippi's present constitution. Coleman, *The Mississippi Constitution of 1890 and the Final Decade of the Nineteenth Century*, 2 A HISTORY OF MISSISSIPPI 3, 10 (R. McLemore ed. 1973).

[197] *See* Board of Supervisors of Elections v. Attorney Gen., 246 Md. 417, 229 A.2d 388, 394-403 (1967)(indicating that constitutional convention is completely independent of state government, and subject only to limitations of federal Constitution and moral law); *see also supra* note 184 and accompanying text.

[198] Sturm, *Procedures*, *supra* note 43, at 583.

[199] Sturm, *State Constitutions and Constitutional Revision, 1976-1977*, THE BOOK OF THE STATES 193, 201 (1978-79).

the current terms and salaries of public officials could not be altered.[200] Texas in 1974 had a constitutional convention that could consider all matters except revision of the state bill of rights.[201] In 1957, some opponents of Mississippi Governor J.P. Coleman's proposal for an unfettered convention wanted to compromise by holding a limited one. The proposal included an initial step of a constitutional amendment which, if approved, would grant the legislature authority to submit to a limited convention only certain suggested amendments.[202]

Excluding from the convention's consideration certain issues that are considered too politically divisive, or which secure interests important to the legislature but which might not be favored by a convention, is a convenient tool to remove major political obstacles to holding a convention. The problem is that limiting the convention may itself by unconstitutional.[203] It might be remembered that the federal Constitution was created in 1787 by delegates who had not been empowered to write a whole new document, but instead had been authorized solely to revise the Articles of Confederation. The *Sproule* case stated that the only limitation upon a convention was "that no change in the form of government shall be done or attempted.[204] If the convention is a sovereign body, which is what the *Sproule* court stated, it is difficult to see how another body could tell it what to do. What usually has been considered by courts and commentators to make such limitations enforceable is to make them part of the referendum by which the people decide whether to hold a convention.[205] If the ballot proposal called for a limited convention, and the people approved, then even under *Sproule* the peo-

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[200] 1972 La. Acts No. 2, §§ 1, 4.

[201] *See* Sturm, *State Constitutions, supra* note 181, at 170.

[202] Wirth, *Opponents Confident Margin to be Held*, The Clarion-Ledger, Nov. 20, 1957, at A1, col. 7.

[203] Graves, *supra* note 4, at 8.

[204] *Sproule*, 69 Miss. at 903-05, 11 So. at 474.

[205] White, *Amendment and Revision of State Constitutions*, 100 U. Pa. L. Rev. 1132, 1139-1142 (1952); Sturm, *The Procedure of State Constitutional Change-With Special Emphasis on the South & Florida* 5 FLA. ST. U.L. REV. 569, 583 (1977); *see* Pryor v. Lowe, 523 S.W.2d 199, 202 (Ark. 1975). The 1973 Louisiana restrictions were held to be binding in Bates v. Edwards, 294 So. 2d 532, 536-37 (La. 1974), *appeal dismissed*, 95 S.Ct. 297.

ple have only partially delegated their authority to write a new constitution. It should be remembered that no referendum was held to authorize the 1890 convention, and thus *Sproule* did not address this issue. What the present Mississippi Supreme Court would do with the question of limiting a constitutional convention must at least be considered open.

Certainly the state legislature may call a constitutional convention and has on many occasions. Can anyone else do so? Can the governor, for example, without legislative authorization create something akin to a constitutional convention? That would be invalid, most practically and obviously because the governor would have no authority to both create offices for constitutional delegates and then to declare an election to fill those offices. Even if a governor prepared a new constitution in some fashion, such as through an appointive commission, he also has no specific authority to put such a proposition on the ballot for approval. The most inventive supreme court judge would likely fail to find that kind of authority even in the penumbras of the governor's constitutional powers.[206]

The question of by what vote margin must a constitutional call be made in the legislature is also not fixed by specific law. Section 273 of the constitution states that any *amendment* to the constitution be by a two-thirds vote. It is generally thought that the convening of a constitutional convention in Mississippi need only have a simple majority.[207] The state supreme court in a 1914 opinion stated *in dicta* that a two-thirds vote is not required to issue a call for a constitutional convention.[208] Associate Justice George H. Ethridge, in a book written in 1928 on Mississippi constitutions, bemoaned what he saw as indisputable "that the legislature by a bare majority vote can call a convention and give it power to promulgate an entire constitution . . . ."[209]

Unless some provision of the constitution or statute specifi-

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[206] The creativity of Mr. Justice William O. Douglas in discovering penumbras to rights guaranteed in the fourteenth amendment to the federal Constitution is detailed in Griswold v. Connecticut, 381 U.S. 479 (1965).

[207] Graves, *State Constitutions and Constitutional Revision, 1957-1959*, THE BOOK OF THE STATES 3, 6 (1960-61).

[208] State ex rel. Collins v. Jones, 106 Miss. 522, 568-73, 64 So. 241, 251-52 (1914).

[209] G. ETHRIDGE, MISSISSIPPI CONSTITUTIONS 470 (1928).

cally requires a super majority vote, then a simple majority under parliamentary procedure would suffice. The only arguable basis for requiring a two-thirds vote is that article 273 requires such a vote before actual amendments may be put on the ballot. The two issues of calling a convention and putting a constitutional amendment on the ballot are related only to the extent that each involves the constitution. As stated by the court in *State ex rel. Collins v. Jones*[210], the amendment is a specific and definite change to the existing constitution that, if appearing on the general election ballot, will become part of the constitution if a majority of the voters agree.[211] On the other hand, the court distinguished, the calling of a constitutional convention is merely the earliest step in a series of actions that must occur before, in time, a whole new constitution may be placed on the ballot. Since article 273 does not even mention the calling of a convention, it can hardly be argued that the two-thirds vote requirement of that provision is applicable. Indeed, as pointed out above, the calling of a convention rests upon the "custom and the universal consent of the people," not upon a specific article of the constitution.[212] Since article 273 does not apply, neither does the two-thirds vote requirement.

It is also evident that only a simple majority vote was required each of the six previous times (in 1831, 1861, 1865, 1868, 1888, and 1890) the legislature issued a call for a convention.[213] Parenthetically, only the calls in 1831 and 1868, and the vetoed bill in 1888, sought a referendum approving the holding of a convention, and only the 1868 convention submitted the final product to the people; the document was rejected.[214] Nor was there any question raised on the issue in 1957, when Governor J.P. Coleman's effort to summon a convention was never

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[210] 106 Miss. 522, 64 So. 241 (1914).

[211] *Id.* at 568, 64 So. at 242.

[212] *See supra* notes 192-94 and accompanying text.

[213] E. Clark, The Mississippi Constitutional Convention of 1890, A Political Analysis 24, 38 (May 1975)(unpublished manuscript available in the University of Mississippi Library); S. Patterson, Mississipi's Four Constitutions: A Study of Political Responses to Societal Change (Aug. 1974)(unpublished manuscript available in the University of Mississippi Library).

[214] S. Patterson, *supra* note 213, at 15, 24, 29, 33 n.1, 39, 43, 45, 51-52, 58, 62, 77.

thought to need more than a simple majority.[215] The issue appears to be historically as well as legally closed; only a simple majority is necessary for the legislature to summon a constitutional convention.

IV. Conclusion

Whether Mississippi needs a new constitution is the fundamental question, and that question is not even addressed in this article. Our belief is that a new constitution is a critical state need, but supporting arguments for that proposition are outside of the scope of this article. What has been the focus is the procedures by which meaningful constitutional change can be effected. The emphasis here is on "meaningful." It is agreed by almost all commentators that much surplus language exists in the present Mississippi Constitution. There are some clearly outdated provisions, other clearly anti-business articles, and even some vestigial racist matters that have largely been voided by court action. Whatever revision procedure is used will equally well handle problems such as these. Real progress in governmental structures and procedures will come when the more controversial issues are tackled. What is the procedure that can best deal with those sorts of questions? The Governor's Constitutional Study Commission,[216] the Young Lawyers Section of the

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[215] A review of the journals of both the senate and the house of representative during the special session that considered the constitution convention issue in 1957 revealed no debate upon whether anything other than a simple majority vote was required. Judge J.P. Coleman, in a conversation with one of the authors on June 25, 1986, said that he recalled no issue ever being raised, since "that is the way a convention has always been called." A review of contemporaneous newspaper articles from the 1957 debate shows no dispute on the point and reveals a few general statements that only a simple majority was required in the legislature. *See, e.g.*, Wirth, *Opponents Confident Margin to be Held*, The Clarion-Ledger, Nov. 20, 1957, A1, col. 7; Herbers, *25 "Undecided" on Convention*, The Clarion-Ledger/Jackson Daily News, Oct. 27, 1957 at A2, col. 4.

[216] The revisions proposed by the Mississippi Constitutional Study Commission have been numerous and far-reaching. Some of the more controversial are summarized in Davis, *Constitution Panel To Tackle Controversy*, The Clarion-Ledger, May 27, 1986, at B1; Brennan, *Constitution Panel to Limit Judicial Officers to Lawyers*, The Clarion-Ledger, May 6, 1986 at A1; Davis, *Limits on Legislative Chiefs Urged*, The Clarion-Ledger, April 22, 1986, at A1, col. 3; Williams, *Constitution Panel: Give Voters Rights to Pass in Laws*, The Clarion-Ledger, April 10, 1986, at A1, col. 3. *See generally supra* note 50.

Mississippi State Bar,[217] and the Mississippi Economic Council,[218] to name a few, have all suggested some major reform in Mississippi state government. Central to many of these recommendations is the general need to reorder the balance of power in Mississippi, and specifically to strengthen the executive branch and judiciary without weakening the legislative branch, except in relative terms. If that imbalance exists, would the writing of a new constitution by the legislature correct or tend to perpetuate that imbalance? More broadly, would the legislature undertake any fundamental changes in the courts, in boards or commissions, in the governance of universities, or as to other perceived deficiencies of the present system?

A list of some of the more sweeping proposals considered by the constitutional study commission—though not in each case adopted—reveals many areas in which legislative opposition would likely be immediate and insurmountable. Many of the suggestions may be undesirable, yet at the least a revision mechanism should be chosen that allows the issues to receive a fair appraisal. Should the house speaker or lieutenant governor have limits placed on their term in office?[219] Should any boards and commissions be mentioned in the constitution?[220] Should the board of trustees of the institutions of higher learning be given authority to close or consolidate schools and programs?[221] Should the appointive state board of education be given authority to consolidate school districts?[222] Should the size of the senate and house of representatives be reduced, or for that matter

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[217] Brennan, *Legal Group Urges Overhaul of Constitution*, The Clarion-Ledger, May 9, 1986, at B1, col. 4.

[218] MISSISSIPPI ECONOMIC COUNCIL, MISSISSIPPI CONSTITUTION—THE NEED FOR CHANGE (1975).

[219] McIntosh, *Panel Suggests Speaker's Role be Weakened*, The Clarion-Ledger, July 10, 1986, at A1, col. 1; Davis, *Limits on Legislature Chiefs Urged*, The Clarion-Ledger, April 22, 1986, at A1, col. 3; *see* Draft Constitution art. V, §§ 10 & 11; art. VI, § 13.

[220] DAVIS, *Constitution Panel to Tackle Controversy*, The Clarion-Ledger, May 27, 1986, at B1, col. 1.

[221] Rabb, *Constitution Panel Debate Continues*, Jackson Daily News, May 26, 1986, at A1, col. 4; *see* Draft Constitution art. IX, § 12.

[222] Canerdy, *Panel: Given Education Unit Consolidation Say*, The Clarion-Ledger, May 27, 1986, at B3, col. 1; *see* Draft Constitution art. IX, § 3.

should the legislature become unicameral?[223] Should judges, at least at the appellate level, be appointed subject to a periodic retention election?[224] Should the people be given the right of initiative, by which changes to the laws may be proposed by the people themselves?[225] Should all counties be required to adopt the unit system that would consolidate services?[226]

Having the legislature write the constitution is not significantly different from giving the governor or supreme court the authority to draft a new document. It is one thing for the legislature to have the authority to write the statutes that control the minutia of government. It is quite another to give any of the three separate but equal branches of government the authority to draft the rules that control relationships between those branches as well as the manner in which the authority of each branch is to be exercised.

There is not a public body existing or proposed that could be immune from politics. A constitutional convention could not, and probably should not, be free of political influence. Even so, Mississippi would likely share the experience of other states, namely, that many of the delegates do not have the goal of a career in political office. Instead, the delegates elected are a blending of the first-time public servant with the leaven of those more politically experienced. All would consider political realities, but are unlikely to do so with the same fervor as a legislator whose career would be affected by his decisions. A cogent example is available of the Mississippi Legislature's understandable reluctance to implement certain kinds of fundamental changes. One of the recommendations of Governor Allain's Constitutional Study Commission is to require that all judges be lawyers.[227]

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[223] Rabb, *Numbers Make Legislature a "Slothful Giant," Report Says*, Jackson Daily News, June 9, 1986, at A1, col. 1; Rabb, *Unicameral Legislature Fails to Win Support of Study Panel*, The Clarion-Ledger/Jackson Daily News, March 22, 1986, at B3, col. 1.

[224] Rabb, *Constitution Committee Proposes High Court be Appointed*, Jackson Daily News, March 25, 1986, at C3, col. 1; *see* Draft Constitution art. VII, §§ 9 & 10.

[225] Williams, *Constitution Panel: Give Voters Right to Pass Own Laws*, The Clarion-Ledger, April 10, 1986, at A1, col. 3; *see* Draft Constitution art. V, § 2.

[226] Williams, *Study Panel Recommends Unit System*, The Clarion-Ledger, May 15, 1986, at B1, col. 5; *see* Draft Constitution art. VIII, § 2.

[227] Brennan, *Constitution Panel Wants to Limit Judicial Offices to Lawyer*, The

That would put the vast majority of justice court judges out of their positions, unless a grandfather clause was also adopted. In 1980, the Mississippi Judicial Council went only slightly further, and proposed elimination of the justice courts. What was eliminated instead after a few weeks of pressure by the justice court judges was the Judicial Council that made the recommendation.[228] This is not to say that the Judicial Council was correct in what it proposed. It does suggest the virulence of political pressures that operate daily on the legislature.

On the issue of whether the people can initiate constitutional revision themselves, the answer can definitely be said to be uncertain. The initiative adopted in 1914 was voided for what would appear to be a mix of political as well as legal reasons. It was an awkwardly written amendment, creating many uncertainties and fears about its impact. It was also subject to a credible, if not entirely convincing, legal attack on whether it embodied two separate subjects. If it did, it could not have been properly submitted to the people as one amendment. The issue is mainly one of semantics, and resolutions of such questions are driven more by beliefs than by logic. The section 6 argument, it can be admitted, is somewhat novel. Even if the concept of a write-in was accepted—no small matter in itself—there could be additional problems of determining the intent of each ballot.

Whatever change is eventually proposed will, in the modern political climate, have to be submitted to the voters. Thus the people will always have the protection of being able to reject an unsatisfactory, extremist document. On the other hand, if the procedure adopted for revising the constitution has institutional handicaps, the people may never be given the opportunity to accept a satisfactory, progressive new constitution. The goal of constitutional revision is to draft a document that corrects

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Clarion-Ledger, May 6, 1986, at A1, col. 1; Draft Constitution art. VII, §§ 8.

[228] The Mississippi Judicial Council was authorized under 1977 Miss. Laws 429, at 650, codified as MISS. CODE ANN. § 9-15-1 (1972), and the sections that follow. An automatic repeal was in the original statue, 1977 Miss. Laws 429, § 6, effective on June 30, 1980. In the 1980 legislature, the justice court recommendation was perceived by some observers to be the principal reason the Council was allowed to "sunset" instead of being renewed. Camire, *Judge Irked 2 Key Foes of Council*, The Clarion-Ledger, May 19, 1980, at A3, col. 1.

whatever fundamental problems there might be in the organization of state government. The goal is not to give an old governmental structure a new date, but to give an old state a new government. If the procedure adopted unreasonably restricts the chance that meaningful change will occur, then constitutional revision will likely be only sound and fury, signifying nothing.

COMMENTARY ON THE BILL OF RIGHTS IN THE MISSISSIPPI CONSTITUTION OF 1890 AND BEYOND

*Luther T. Munford**
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State constitutional revisers have frequently applied to bills of rights Mr. Jefferson's admonition that each generation should adopt its own constitution.[1] Every state has a different bill of rights. The federal Bill of Rights, modeled on early state bills of rights, mirrors none of them. In Mississippi every constitutional convention has revised our Bill of Rights.

The selection of new language for a state bill of rights properly depends on the purpose served by a state bill of rights, the interpretation given existing language, and the construction placed upon provisions in the federal constitution that provide either parallel rights or, in some cases, conflicting rights. This commentary accordingly will discuss the purpose of a state bill of rights, suggest factors to consider in drafting a state bill of rights, review the provisions of the existing Bill of Rights in the Mississippi Constitution of 1890, and comment on changes that

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[1] Jefferson believed that "the earth belonged always to the living generation." As he wrote James Madison, "every constitution, then, and every law, naturally expires at the end of nineteen years." D. MALONE, JEFFERSON AND THE RIGHTS OF MAN 179 (1951); *see also* A. DETOCQUEVILLE, DEMOCRACY IN AMERICA 94 (Bradley ed. 1985)("every fresh generation is a new people ready for the care of the legislator").

might be made when and if Mississippi revisers accept Mr. Jefferson's challenge and propose a new bill of rights for the state.

A. The Purpose of a State Bill of Rights

In a constitutional democracy, bills of rights grant rights to individuals and minorities. They restrict the power of the democratic state, and so check the power of the majorities the state represents. Bills of rights trace their history to the Magna Carta and the English Bill of Rights of 1689. While other constitutional provisions grant powers to the state and allocate those powers among the branches of government, the bill of rights grants to the judiciary a text to protect the individual from the state. So important is this limit on government that one commentator has noted that even to suggest that a modern state constitution not include a bill of rights would be "un-American."[2]

It can be argued, however, that advances in federal law have rendered state bills of rights redundant. The United States Supreme Court has created and expanded an "absorption" or "incorporation" doctrine that has now applied most of the provisions in the federal Bill of Rights to the states through the fourteenth amendment.[3] As a result, individuals no longer need state bills of rights to protect most essential rights from state interference. Taking incorporation one step further, state courts have often looked to incorporated federal law in determining the

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[2] Mazor, *Notes on a Bill of Rights in a State Constitution*, 10 Utah L. Rev. 307, 326-27 (1966).

[3] *See, e.g.*, Benton v. Maryland, 395 U.S. 784, 793-96 (1969) (fifth amendment's prohibition against double jeopardy applicable to state courts through fourteenth amendment, overruling Palko v. Connecticut, 302 U.S. 319, 324-28 (1937)); Mapp v. Ohio, 367 U.S. 643, 655 (1969)(exclusionary rule of evidence applicable to state courts through fourth and fourteenth amendments); Everson v. Board of Education, 330 U.S. 1, 15-18 (1947)(first amendment's "establishment of religion" clause applicable to state statutes through fourteenth amendment).

Professor Charles N. Fortenberry, who in 1960 proposed revisions to the Mississippi Constitution of 1890, states "there appears to be no very good reason why a right, protected against the state government by the terms of the national constitution, should be again guaranteed against the same government by the constitution of that state." Fortenberry, *The Bill of Rights*, Yesterday's Constitution Today 9, 20 (Hobbs ed. 1960). He concludes, however, that the "more essential" rights should be included for emphasis, extension, convenience, and general satisfaction. *Id.* at 21.

meaning of state constitutional provisions, even when the wording is not identical.[4] This promotes uniformity and gives state courts and litigants the advantage of federal experience. While a recent movement known as "the New Federalism" has advocated that states depart from the prevailing federal construction of incorporated federal provisions, this movement is said by some to represent nothing but thinly disguised result-oriented jurisprudence motivated by partisan disapproval of the decisions of the current United States Supreme Court.[5] In any event, the incorporation doctrine has sapped the vitality of state bills of rights.

Several considerations, however, counsel against total reliance on the federal incorporation doctrine, especially a reliance so complete that revisers either entirely edit out state bills of rights or permit them to wither away as archaic appendages to an otherwise robust state constitution.

First, the structure of the federal constitutional scheme suggests that states are not to be mere ciphers of the federal government. Accordingly, states need their own bills of rights to guarantee that states may play an independent role in the protection of individual liberty. Protection of individual rights is, after all, one of the most important functions of any constitutional government. Without independent state constitutional

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[4] *See, e.g.*, Sanders v. State, 429 So. 2d 245, 251-52 (Miss. 1983)(standards and principles of double jeopardy clause of fifth amendment to Constitution of United States as applicable to states through fourteenth amendment are equally applicable to double jeopardy clause of state constitution); McCrory v. State, 342 So. 2d 897, 901 (Miss. 1977)(section 26 prohibition against being forced to "give evidence against himself" construed identically to fifth amendment's restriction against a defendant being "a witness against himself").

[5] *See, e.g.*, Collins, *Reliance on State Constitutions—Away From a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1, 2-3 (1981)(for some, state constitutions are "a handy grab bag filled with a bevy of clauses that may be exploited in order to circumvent disfavored United States Supreme Court decisions"); Wilkes, *First Things Last: Amendomania and State Bills of Rights*, 54 MISS. L.J. 223, 230 n.28 (1984)(citing judicial criticism)[hereinafter cited as Wilkes, *First Things Last]; Wilkes, The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 *passim* (1973)(pattern of evasion shown by deciding cases on adequate and independent state constitutional grounds). The United States Supreme Court has responded by refusing to recognize adequate and independent state grounds unless they are found in a "clear and express statement" in the lower court's opinion. Michigan v. Long, 463 U.S. 1032, 1041 (1983).

decisionmaking, a state supreme court is not "supreme," and becomes nothing more than "yet another federal intermediate appellate court" in individual rights cases.[6] Similarly, the application of a state bill of rights to state government helps promote federalism. It encourages persons to look first to state constitutions for vindication of personal rights threatened by state law.[7]

Second, the federal scheme does not in all cases protect individual rights from state infringement. Some federal provisions, for example, the right to indictment by grand jury, have not been extended to the states. The United States Supreme Court has made the grant of that right a matter of state prerogative. The people of a state may also choose to adopt protections, such as the equal rights amendment, not part of the federal scheme. Additionally, while the incorporation doctrine currently controls constitutional interpretation, the doctrine is judge-made, has been criticized, and may change. Only by placing rights in the text of the state constitution can the continued existence of those rights be assured.

Third, granting an independent role to state courts in interpreting individual rights maximizes the protection of those rights. Individuals will enjoy all the protection provided by either federal or state constitutions. Federal rights are a "floor," but state rights may go further in protecting individual liberty.[8]

Finally, the structure of state constitutional systems suggests an enhanced role for a state judiciary in protecting individual rights. The justices of the United States Supreme Court hold

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[6] Collins, *Reliance on State Constitutions—The Montana Disaster*, 63 TEX. L. REV. 1095, 1116 (1985). Dissenting in a case that held no jury trial was necessary prior to sentencing under a habitual offender statute, Justice Armis Hawkins relied on § 26 and said: "This Court is the highest Court in the United States in determining what our State's Constitution means. Here our right is absolute, and our responsibility is nondelegable. We are the Court of last resort on this question, and we are required to look nowhere else." Wilson v. State, 395 So. 2d 957, 963-64 (Miss. 1981)(Hawkins, J., dissenting).

[7] *See* NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION 27 (6th rev. ed. 1968)(persons should look first to state constitution and courts for protection of personal liberties in order to support federal system) [hereinafter cited as NATIONAL MUNICIPAL LEAGUE]; Comment, *The Primacy Method of State Constitutional Decision Making: Interpreting the Maine Constitution*, 38 MAINE L. REV. 491 (1985).

[8] *See* Chill v. Miss. Hosp. Reimbursement Comm'n, 429 So. 2d 574, 582 (Miss. 1983)("federal constitutional protections represent only a minimum").

their offices "during good behavior,"[9] which usually coincides with lifetime tenure. Only impeachment can remove them. When they protect individual rights by declaring a federal statute unconstitutional, they frustrate majority will expressed in a statute adopted by a democratically elected Congress. Their reluctance to act as a "bevy of platonic guardians"[10] cautions them to construe federal rights provisions narrowly. In ruling on the constitutionality of state statutes, the United States Supreme Court may additionally be influenced by a desire to protect state prerogatives or to ensure that states continue to have the freedom to experiment by adopting different systems of government.[11]

In a state constitutional system where judges are elected or are subject to recall votes, or even legislative removal for "reasonable cause,"[12] none of these cautions applies. A state court may advance an expansive view of individual rights secure in the knowledge that if it has gone too far, the voters can speak at the next election. Similarly, state constitutions are more easily amended than the federal Constitution. State courts also need have no concern with federalism, because their interpretations of state constitutions have no binding effect in other states. For these reasons, state courts are free of these prudential concerns that limit federal constitutional decisionmaking. The same logic that limits the federal courts frees the state courts to chart an independent path in constitutional interpretation.[13]

In sum, states need independent bills of rights, notwithstanding the federal incorporation doctrine, to give states the independent role in the protection of individual rights envisioned

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[9] U.S. CONST. art. III, § 1.

[10] L. HAND, THE BILL OF RIGHTS 73 (1958).

[11] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 604-06 (1980)(Rehnquist, J., dissenting)("to gradually rein in, as this Court has done over the past generation, all of the ultimate decision-making power over how justice shall be administered, not merely in the federal system, but in each of the 50 states, is a task that no court consisting of nine persons, however gifted, is equal to.").

[12] *See* MISS. CONST. of 1890, § 53.

[13] *See* Howard, *Introduction: A Frequent Recurrence to Fundamental Principles*, DEVELOPMENTS IN STATE CONSTITUTIONAL LAW (McGraw ed. 1985)(state judges may feel less constrained than federal judges because of more "opportunities for discontent" to be expressed).

in the federal Constitution, to protect rights not protected by federal incorporation, to maximize protection of individual rights, and to permit protection of individual rights by state courts which are free from several of the prudential constraints that may make the United States Supreme Court reluctant to favor individual rights.

These purposes for an independent state bill of rights suggest that state courts may give independent meaning to state constitutional language, even when it is identical to federal language. In particular, independent meaning maximizes protection of individual rights and recognizes that state courts are free from federal prudential constraints.

Absent specific historical evidence to the contrary, there is no reason to conclude in every case that the framers, by using federal language, intended a result identical to that found in federal court. Although the normal presumption is that language borrowed from another jurisdiction carries with it the construction previously placed on it, some language in state bills of rights antedates the federal Constitution. Even when federal language came first, if it was intended that federal and state rights always be identical in the future, the text could have merely referred directly to the federal provision.[14] Particularly with respect to federal provisions that applied to the states at the time the state constitution was rewritten, such as the fourteenth amendment's due process clause, the existence of an identical state provision may imply an independent textual commitment to state protection.

For these reasons, many courts and commentators have endorsed the expansion of rights beyond the federally mandated "floor," while warning against decisions that merely use an unprincipled version of this approach to express disapproval of the United States Supreme Court.[15] More recently, state courts have

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[14] *See, e.g.*, FLA. CONST. art. I, § 12 (expressly incorporating "decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution").

[15] *See* Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 395 (1980)(people of state not bound to be satisfied with minimum standards enunciated in Bill of Rights in United States Constitution); Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 717

increasingly sought to encourage more principled approaches to state constitutional arguments that may incidentally provide results different from arguments advanced under identical federal constitutional provisions.[16]

These purposes and developments suggest several questions to be considered in revising a state bill of rights:

1. Is the provision identical to a federal constitutional guarantee that applies to the states?

2. If so, is the provision so important that it should also be included in a state constitution? Within the question lies another consideration, whether the federal guarantee should be adopted by reference or whether independent state language should be used.

3. If not identical to a federal guarantee, does the provision nonetheless protect a right so important that it merits inclusion in the state bill of rights? The answer to this question may depend on the historical importance of the right and the experience of other states.

(1983)(state courts must develop standardized application of state constitutions to avoid unprincipled reliance only in contravention to United States Supreme Court); Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297, 298-300 (1977) (state courts can engage in principled independent interpretation by comparing their reasoning under state constitution to reasoning of Supreme Court of United States under United States Constitution). *See generally* Note, *Developments—State Constitutions*, 95 HARV. L. REV. 1324 (1982)(discussion of various state constitutional rights within federal system).

[16] *See, e.g.*, Killingsworth v. State, 490 So. 2d 849, 850-51 (Miss. 1986)(state not bound by "minimum" federal requirements covering withdrawal of appointed counsel); Penick v. State, 440 So. 2d 457, 552 (Miss. 1983)(words of Mississippi Constitution are not "balloons to be blown up or deflated" every time United States Supreme Court changes federal law); State v. Jewett, 500 A.2d 233, 235-37 (Vt. 1985)(encouraging principled approach to state constitutional interpretation and argument); State v. Beno, 341 N.W. 2d 668, 674-75 (Wis. 1984)(encouraging independent construction of state constitution); *see also* Collins, *Reliance on State Constitutions: Some Random Thoughts*, 54 MISS. L.J. 371, 374-76 (1984)(giving initial consideration to state law claims lends certainty to state law); Note, *The Principle Problem:* State v. Jewett *and the New Judicial Federalism*, 10 VT. L. REV. 437, 439 (1985)(delineates methods of constitutional interpretation to aid practitioner facing state constitutional law issue); National Law Journal, Sept. 29, 1986, at S-1 to S-20 (comprehensive bibliography of decisions and publications discussing independent decisionmaking based on state constitutions).

4. Is the revision politically practical? Bills of rights protect the rights of individuals and minorities. By definition the majorities that must approve the adoption of such provisions have reason to be hostile to them. Many states have recently amended their bills of rights to restrict individual liberties.[17] For this reason, it may be wise to forgo some changes, particularly cosmetic changes that may be misinterpreted by the electorate.

B. The Interpretation of the Bill of Rights in the Mississippi Constitution of 1890

Since Justice George Ethridge's *Mississippi Constitutions*, published in 1928, no author has attempted a comprehensive review of the Mississippi Constitution of 1890 or of its Bill of Rights.[18] A 1960 article by Professor Charles N. Fortenberry, "The Bill of Rights,"[19] includes a brief synopsis of the Bill of Rights and his suggestions for revision, which although perceptive are now a quarter-century old.

A complete synopsis of each decision construing the 1890 Bill of Rights is beyond the scope of this article. Indeed, the lack of any sure guide to those decisions or other decisions construing the 1890 text would make it prudent for modern revisers to disclaim specifically the doctrine that reenactment of a constitutional provision ratifies all prior court decisions construing that section.[20]

Instead, the following analysis compares the text of Mississippi's 1890 Bill of Rights to the rights guaranteed by the fed-

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[17] *See* Wilkes, *First Things Last*, *supra* note 5, at 233-34, 234 n.44 (listing amendments).

[18] Justice Ethridge's book lists cases decided under the constitution as of 1928. G. Ethridge, Mississippi Constitutions 35-154 (1928). *Shepard's Mississippi Citations* cites cases decided under the constitution by section since 1944. The Mississippi Code Annotated of 1972 lists some cases but is not comprehensive. Another useful article is Howerton, *Unconstitutional Legislation in Mississippi*, 16 Miss. L.J. 88, 93-123 (1944).

[19] Fortenberry, *supra* note 3, at 9.

[20] *See* Masonite Corp. v. Lochridge, 163 Miss. 364, 384, 141 So. 758, 759 (1932)(adoption of sections of constitution of 1869 by Constitutional Convention of 1890 automatically readopted court construction of those sections).

eral Constitution, notes its predecessors in prior Mississippi Constitutions,[21] briefly describes its use by the state courts,[22] and where appropriate, compares it to rights found in other state constitutions,[23] all to provide a foundation for suggesting revisions to the historic text. Source references to previous Mississippi constitutions are indicated by the enactment dates of the prior constitutions.

Section 5.

> All political power is vested in, and derived from, the people; all government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole.

Sources: 1817: article I, section 2; 1832: article I, section 2.

Comparable Provision in United States Constitution: None.

Commentary: Although taken from the original Mississippi Constitution, this hortatory language has seldom been considered by the courts. The Mississippi Supreme Court did, however, invoke section 5 in its historic police power decision, *State v. J.J. Newman Lumber Co.*[24] There the court upheld a statute limiting a manufacturing working day to ten hours. The court

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[21] Justice Ethridge's MISSISSIPPI CONSTITUTIONS, *supra* note 18, contains the text of the 1817, 1832, 1869 and 1890 constitutions. *See also* Howerton, *supra* note 18, at 93-123 (tracing evolution of constitutional provisions). Useful historical articles on the constitutions include Coleman, *The Mississippi Constitution of 1890 and the Final Decade of the Nineteenth Century*, 2 A HISTORY OF MISSISSIPPI 3 (R.A. McLemore ed. 1973); Drake, *The Framing of Mississippi's First Constitution*, 29 J. OF MISS. HIST. 301 (1967); Drake, *The Mississippi Constitutional Convention of 1832*, 23 J. So. HIST. 354 (1957) [hereinafter cited as Drake, *Convention of 1832*]; Winter, *The Journal of the Constitutional Convention of 1817*, 29 J. OF MISS. HIST. 443 (1967).

[22] The authors base their descriptions on the texts cited *supra* note 18 together with an examination of all cases citing the Bill of Rights since 1960, the year Professor Fortenberry's article was published. This includes volume 116 of the *Southern Reporter 2d* and subsequent volumes.

[23] *See* CONSTITUTIONS OF THE UNITED STATES: NATIONAL & STATE (F. Crad 2d ed. 1982); SOURCES OF OUR LIBERTIES (R. Perry ed. 1978); W. SWINDLAR, SOURCES & DOCUMENTS OF UNITED STATES CONSTITUTIONS (1979); Collins, *Bills & Declarations of Rights Digest*, THE AMERICAN BENCH 2483 (1985).

[24] 102 Miss. 802, 59 So. 923 (1912).

construed the statement that "government is instituted solely for the good of the whole" to mean that it was the "duty of the Legislature to consider the interest of all—what is best for society generally."[25] More recently, in *Fondren v. State Tax Commission*,[26] the court relied on section 5, among other authorities, to support a taxpayer's right to sue to enjoin the Mississippi State Tax Commission until it had complied with its statutory and constitutional duty to equalize assessments among counties.[27]

The language does not conflict with the federal Constitution and states an important political principle. The attempt to remove such language from the Maryland Constitution was one of the causes of the defeat of constitutional revision in that state in 1968.[28]

Section 6.

> The people of this state have the inherent, sole, and exclusive right to regulate the internal government and police thereof, and to alter and abolish their constitution and form of government whenever they deem it necessary to their safety and happiness; Provided, Such change be not repugnant to the constitution of the United States.

Sources: 1817: article I, section 2; 1832: article I, section 2.

Comparable Provision in United States Constitution: None.

Commentary: This section expressly provides for the police power of the state. Its reference to the people's power to "abolish their constitution and form of government" has been relied upon to support freedom of speech for political dissenters.[29] The

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[25] *Id.* at 822-23, 59 So. at 925; *see also* Wheeler v. Shoemake, 213 Miss. 374, 399-403, 57 So. 2d 267, 280 (Miss. 1952)(youth court statute constitutional).

[26] 350 So. 2d 1329 (Miss. 1977), *cert. denied*, 450 U.S. 1040 (1981).

[27] *Fondren*, 350 So. 2d at 1332.

[28] Howard, *Constitutional Revision: Virginia and the Nation*, 9 U. RICH. L. REV. 1, 24 (1974).

[29] *See* Seales v. United States, 367 U.S. 203, 276 (1961)(Douglas, J., dissenting)(citing similar provisions in 39 state constitutions); Taylor v. State, 94 Miss. 1, 47, 11 So. 2d 663, 678 (1943)(Anderson, J., dissenting)(recognizing freedom of individuals to speak against state constitutions), *rev'd sub. nom.* Taylor v. Mississippi, 319 U.S. 583

Constitutions of 1817 and 1832 provided that "all political power is inherent in the people." The 1890 convention added to this phrase the words "sole, and exclusive." These words and the final sentence of the section are contrary to the supremacy clause of the United States Constitution which provides that the Constitution and federal laws shall "be the supreme Law of the Land . . . anything in the constitution or laws of any State to the contrary notwithstanding."[30] No doubt cognizant of this difficulty, the revisers in 1890 added that changes to the Mississippi Constitution must not be "repugnant to the Constitution of the United States." This proviso is inadequate because it ignores the supremacy of federal statutes as well as federal constitutional provisions.

In *Tatum v. Wheeless*[31] the Mississippi Supreme Court rejected an attack under section 6 on the constitutionality of the Mississippi unemployment compensation law, which placed state funds under the control of the federal treasury. The court held that section 6 did not "prevent co-operation between the state and federal governments, where each acts within its appropriate sphere."[32]

Section 7.

> The right to withdraw from the Federal Union on account of any real or supposed grievance, shall never be assumed by this state, nor shall any law be passed in derogation of the paramount allegiance of the citizens of this state to the government of the United States.

Sources: 1869: article I, section 20.

Comparable Provision in United States Constitution: article VI, clause 2 (supremacy clause).

Commentary: This section, written in 1869, is superfluous in view of the supremacy clause in the federal Constitution as well

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(1943).

[30] U.S. CONST. art. VI, cl. 2; *see* Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 170 & n.24 (1982)(federal agency regulation preempts state law covering "due on sale" mortgage clauses).

[31] 180 Miss. 800, 178 So. 95 (1938).

[32] *Id.* at 823, 178 So. at 100.

as the post-Civil War amendments to that Constitution. In *Texas v. White*,[33] the United States Supreme Court held that the preambles to the Articles of Confederation and to the Constitution created a "perpetual Union, made more perfect," which could not be dissolved. The Court held there was no right to withdraw from that Union.[34]

Fortenberry recommended that this section be eliminated because it is one of the sections which "adds nothing to the guarantees already in effect on this subject."[35] The Mississippi Supreme Court has never had any occasion to construe this section, and may never have cited it.

Section 8.

All persons, resident in this state, citizens of the United States, are hereby declared citizens of the state of Mississippi.

Source: 1869: article I, section 1.

Comparable Provisions in United States Constitution: amendment XIV.

Commentary: This language duplicates the first section of the fourteenth amendment which provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." This language in the fourteenth amendment overruled the Dred Scott decision.[36] Section 8 has apparently never been construed nor cited by the Mississippi Supreme Court.

Section 9.

The military shall be in strict subordination to the civil power.

Source: 1869: article I, section 25.

Comparable Provision in United States Constitution: arti-

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[33] 74 U.S. (7 Wall.) 700 (1869).

[34] *Id.* at 724-26.

[35] Fortenberry, *supra* note 3, at 21.

[36] Scott v. Sandford, 60 U.S (19 How.) 393 (1857).

cle II, section 2, clause 1 states that the President is the "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . ." Article I, section 8, clauses 11-14 give Congress the authority to declare war and to make rules for the land and naval forces.

Commentary: One of the grievances in the Declaration of Independence in 1776 was that the king had rendered "the military independent of, and superior to the civil power." The Delaware Declaration of Rights section 20, adopted a few months later, provided that "the military ought to be under strict subordination to and governed by the civil power." Such is the historic origin of section 9.

Writing in 1928, Justice Ethridge believed that this constitutional provision was very important, for "all officers and all citizens who exercise the rights of franchise are under oath to support the constitution of the state." Noting controversies concerning the use of state militias during civil disturbances, he declared:

> There is no constitutional provision in this state regulating the proclaiming of martial law and it seems to be the weakest point in our constitutional system. The power ought only to be exercised until the legislature can be assembled to pass upon and there ought to be some constitutional safeguards to protect the state from any possible military rule without the consent of the legislature.[37]

In *State v. McPhail*,[38] the Mississippi Supreme Court interpreted section 9 as authorizing and requiring the civil courts to exercise judicial review over actions of a governor in ordering out the National Guard.[39]

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[37] G. ETHRIDGE, *supra* note 18, at 62-63 (1928); *see also* MISS. CONST. art. 9, § 217 (governor as commander-in-chief of militia has power to call forth militia to execute laws, repel invasion, and to suppress riots and insurrections).

[38] 182 Miss. 360, 180 So. 387 (1938).

[39] *Id.* at 377, 180 So. at 392.

Section 10.

> Treason against the state shall consist only in levying war against the same or in adhering to its enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

Sources: 1817: article VI, section 3; 1832: article I, section 3; 1869: article I, section 26.

Comparable Provision in United States Constitution: article III, section 3, clause 3 is identical to the Mississippi Constitution except that it refers to the United States rather than the state.

Commentary: This section restricts the legislature's ability to use the criminal law to punish those who criticize the government. Like the federal provision, it bars the ancient practice which permitted even trivial offenses against the King to be punishable as treason. As Justice Ethridge noted, it "is a salient provision and enables the people to criticize acts of officers without fear."[40]

The crime of treason against a state was recognized prior to the adoption of the federal Constitution in 1787.[41] There are a few cases since then recognizing the crime. Mississippi's treason statute[42] dates to at least 1823.[43] There is no record of any prosecution for this crime in the annotations to the state's code books.

Certainly since the War Between the States altered the concept of state sovereignty, it is difficult to conceive of an act properly punishable as treason against a state which would not

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[40] G. ETHRIDGE, *supra* note 18, at 63; *see also* Taylor v. State, 194 Miss. 1, 56-57, 11 So. 2d 663, 682 (1943)(Anderson, J., dissenting)(emphasizing importance of freedom of citizens to criticize government). In *Taylor*, an evenly divided Mississippi Supreme Court upheld the prosecution of a Jehovah's Witness accused of encouraging disloyalty to the state by handing out anti-war religious literature. *Taylor*, 194 Miss. at 41, 11 So. 2d at 676. The United States Supreme Court reversed the decision and held that the Mississippi disloyalty statute violated the first amendment to the United States Constitution. Taylor v. Mississippi, 319 U.S. 583, 589-90 (1943).

[41] *See* 70 AM. JUR. 2D *Subversive Activities and Treason* § 66 (1973).

[42] MISS. CODE ANN. § 97-7-61 (1972).

[43] *See* MISS. REV. CODE OF 1823, ch. 54, § 1.

also be punishable as treason against the United States. Federal legislation on this subject would probably now be held to preempt a state prosecution for treason, if one were attempted.[44]

Section 11.

> The right of the people peaceably to assemble and petition the government on any subject shall never be impaired.

Sources: 1817: article I, section 22; 1832: article I, section 22; 1869: article I, section 6.

Comparable Provision in United States Constitution: amendment I.

Commentary: This language is similar to the final clause of the first amendment. The Mississippi Supreme Court has held that it does not prevent the legislature from adopting a statute preventing a political party from using a name previously registered by another party.[45] Additionally, a dissenting justice has cited section 11 in support of the right of a policeman to join a union.[46]

Section 12.

> The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons.

Sources: 1817: article I, section 23; 1832: article I, section 23; 1869: article I, section 15.

Comparable Provision in United States Constitution: amendment II.

Commentary: This language is similar to that of the second amendment, except that it lacks the limiting preamble found in

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[44] *See* Pennsylvania v. Nelson, 350 U.S. 497, 504 (1956)(federal anti-communist legislation preempts state prosecution for sedition).

[45] Hoskins v. Howard, 214 Miss. 481, 494, 59 So. 2d 263, 268 (1952).

[46] City of Jackson v. McLeod, 199 Miss. 676, 704, 24 So. 2d 319, 328 (1946)(McGehee, J., dissenting).

that amendment, which states that the purpose of the second amendment is to promote a "well regulated Militia." Oklahoma has construed its provision similar to section 12 to be limited to arms suitable for militia use,[47] but that holding has been questioned.[48]

The United States Supreme Court has held that the second amendment does not apply to the states.[49] The Mississippi Supreme Court has relied on section 12 in narrowly construing a statute prohibiting the carrying of concealed weapons.[50]

Section 13.

> The freedom of speech and of the press shall be held sacred; and in all prosecutions for libel the truth may be given in evidence, and the jury shall determine the law and the facts under the direction of the court; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted.

Sources: 1817: article I, sections 6-8; 1832: article I, sections 6-8; 1869: article I, section 4.

Comparable Provision in United States Constitution: amendment I.

Commentary: This section reflects the combination in 1869 of what had previously been three separate sections concerning freedom of the press.

The first part of the section, stating that "freedom of speech and of the press shall be held sacred," has been said by the Mississippi Supreme Court to appear "to be more protective of the individual's right to freedom of speech than does the first amendment since our Constitution makes it worthy of religious

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[47] Ex parte Thomas, 1 Okla. Crim. 210, 97 P. 269, 264-65 (1908).

[48] Dowlut & Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. CITY UNIV. L. REV. 177, 217-21 (1982).

[49] *Id.* at 178 n.3; *see* Presser v. Illinois, 116 U.S. 252, 265 (1886)(second amendment not applicable to states).

[50] Patterson v. State, 251 Miss. 565, 573, 170 So. 2d 635, 639 (1965); *see also* Collins, *supra* note 16, at 410 n.136 (discussing § 12 and similar state provisions).

veneration."[51]

The Mississippi Supreme Court has repeatedly relied on section 13 in reversing contempt judgments against journalists and others critical of the courts.[52] The court has held that section 13 protects the right "to speak wisdom or even heresy,"[53] to criticize courts,[54] and to have "the opportunity to learn, and the right to publish, the legitimate facts of trials."[55]

In *Ferguson v. Watkins*[56] the court created under section 13 a constitutional privilege to comment on the conduct of a "vortex public figure." The court defined "vortex public figure" more expansively than some federal courts have defined similar concepts under the first amendment. The court said a "vortex public figure" is "any person who becomes involved, voluntarily or involuntarily, in any matter of legitimate public interest."[57]

The language in section 13 after the words "and in all prosecutions for libel" derives from sections which were separately stated prior to 1869. It applies to criminal "prosecutions" for libel. It was intended to overrule English law which chilled criticism of government by permitting a royally appointed judge to convict a defendant of criminal libel with the only question for the jury being whether or not the defendant had published the statement.[58]

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[51] ABC Interstate Theatres, Inc. v. State, 325 So. 2d 123, 127 (Miss. 1976). In *ABC Interstate Theatres*, the court held a criminal obscenity statute unconstitutional. *Id.* at 127; *see also* Ferguson v. Watkins, 448 So. 2d 271, 279 (Miss. 1984)(commentary regarding public figure or vortex public figure held qualifiedly privileged); Gulf Publishing Co. v. Lee, 434 So. 2d 687, 696 (Miss. 1983)(quoting *ABC Interstate Theatres* in context of libel suit).

[52] *See* Evers v. State, 241 Miss. 560, 573, 131 So. 2d 653, 659 (1961)(contempt charge reversed on constitutional grounds); Brannon v. State, 202 Miss. 571, 585, 29 So. 2d 916, 920-21 (1947)(contempt judgment against journalist reversed by court); Sullens v. State, 191 Miss. 856, 873-74, 4 So. 2d 356, 362-63 (1941)(constructive contempt judgment discharged on constitutional grounds).

[53] Sullens v. State, 191 Miss. 856, 871, 4 So. 2d 356, 362 (1941).

[54] Evers v. State, 241 Miss. 560, 573, 131 So. 2d 653, 659 (1961).

[55] Brannon v. State, 202 Miss. 571, 582, 29 So. 2d 916, 919 (1947).

[56] 448 So. 2d 271 (Miss. 1984).

[57] *Id.* at 278. *But cf.* Whitten v. Commercial Dispatch Pub. Co., 487 So. 2d 843, 845 (Miss. 1986)(not "vortex public figure" simply because charged with crime).

[58] *See* Garrison v. Louisiana, 379 U.S. 64, 71 n.7 (1964)(constitutional language provided for defense of truth); Oakes v. State, 98 Miss. 80, 91-92, 54 So. 79, 82 (1910)(constitutional language designed to guarantee jury's right to render general verdict in favor

This language is now obsolete. The crime of libel no longer exists in Mississippi. In 1971 the court, in *Boydstun v. State*,[59] found Mississippi's criminal libel statute unconstitutional.[60] Additionally, the United States Supreme Court noted the "virtual disappearance" of criminal libel actions in *Garrison v. Louisiana*.[61] *Boydstun* is one of only two recorded criminal libel actions in Mississippi in this century, and in both cases the Mississippi Supreme Court ruled for the defendant.[62] Also, under the federal Constitution, proof of both falsehood[63] and fault[64] are necessary even in a civil libel suit.

Section 14.

No person shall be deprived of life, liberty, or property except by due process of law.

Sources: 1817: article I, section 10; 1832: article I, section 10; 1869: article I, section 2.

Comparable Provision in United States Constitution: amendment XIV.

Commentary: Like its federal counterpart, this provision prohibits deprivation of life, liberty or property without due process of law. The rights protected by this section are the same as those protected by the fourteenth amendment.[65] The Mississippi

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of defendant in criminal libel case); L. FRIEDMAN, HISTORY OF AMERICAN LAW 251 & n.8 (1973)(common state provision for juries to be judge of fact and law in "prosecutions or indictments for libel"); Kurland, *The Original Understanding of the Freedom of the Press Provision of the First Amendment*, 55 MISS. L.J. 225, 236, 248 (1985)(language originated in Fox's Libel Act of 1791, 32 Geo. 3, ch. 60, and was susbsequently written into state constitutions).

[59] 249 So. 2d 411 (Miss. 1971).

[60] *Id.* at 414.

[61] *Garrison*, 379 U.S. 64, 68 (1964).

[62] The other case was Oakes v. State, 98 Miss. 80, 91-92, 54 So. 79, 82 (1910).

[63] Philadelphia Newspapers, Inc. v. Hepps, 106 S. Ct. 1558, 1563 (1986).

[64] Gertz v. Robert Welch Co., 418 U.S. 323, 347 (1974).

[65] *See* Mississippi Power Co. v. Goudy, 459 So. 2d 257, 275 (Miss. 1984)(Hawkins, J., concurring for five members of court)(rights guaranteed under fourteenth amendment to United States Constitution and article 3, § 14 of Mississippi Constitution are same); *id.* at 283 (Robertson, J., dissenting)(stating clauses "essentially identical"); *see also* In Re Validation of $7,800,000 Combined Util. Sys. Revenue Bond, 465 So. 2d 1003, 1020 (Miss. 1985)("essentially identical to federal guarantee"); NCAA v. Gillard, 352 So. 2d

Supreme Court has at times chosen to address a point on federal constitutional grounds rather than under the state due process provision because of the abundance of federal cases.[66]

Litigants have frequently invoked the due process clause to challenge even long-standing statutes and judicial doctrines but in recent years have met with little success.[67] Even when initial efforts are unavailing, however, some rejected challenges have been followed in a short time by radical changes in the law, either by changes in court rules or by legislative enactment.

Two recent Mississippi examples of this course of events are the medical privilege statute and governmental immunity. In *French Drug Co. v. Jones*,[68] the court rejected a due process challenge to the medical privilege statute. There, a pharmacy appealed a jury verdict based on negligence in filling a drug prescription. Because of the statute, which generally prohibited the disclosure of communications between physicians and patients, the defendant was unable to discover evidence critical to its defense. The pharmacy contended that the statute violated section 14 because it "promulgates injustice, suppresses the truth, encourages the denial of equal protection, due process and justice."[69] Although the court summarily rejected the challenge citing prior precedent, in 1983 the legislature amended the statute to provide an exception to the privilege where claims are made against physicians and other medical professionals, providing

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1072, 1081 (Miss. 1977)("both of which are identical"); Walters v. Blackledge, 220 Miss. 485, 515, 71 So. 2d 433, 444 (1954)(due process required by federal Constitution is same due process required by § 14 of Mississippi Constitution). *But see* Clinton Mun. Separate School Dist. v. Boyd, 477 So. 2d 237, 241 (Miss. 1985)(property right to minimally adequate public education "fundamental" under state law, but not federal law).

[66] *See* Hickson v. State, 472 So. 2d 379, 383 n.2 (Miss. 1985)("We dismiss this point on federal constitutional grounds because the jurisprudence there is well developed."); Mississippi Power Co. v. Goudy, 459 So. 2d 257, 283 (Miss. 1984)(Robertson, J., dissenting)(acknowledges more complete development of federal due process jurisprudence).

[67] *See* Genesco, Inc. v. J.C. Penney Co., 313 So. 2d 20, 23-24 (Miss. 1975)(blue laws not violation of § 14); Hattiesburg Firefighters Local 184 v. City of Hattiesburg, 263 So. 2d 767, 771 (Miss. 1972)(ordinance requiring civil service employees to live within city did not violate § 14); Mississippi Milk Comm'n v. Vance, 129 So. 2d 642, 653-54 (Miss. 1961)(Milk Control Act does not violate § 14). *But see* Sharp v. State, 127 So. 2d 865, 868-69 (Miss. 1961)(section 14 requires service of process on minor in proceeding to place minor in reformatory).

[68] 367 So. 2d 431 (Miss. 1978).

[69] *Id.* at 443.

that the privilege was waived by the filing of an action or delivery of written notice of a claim for professional services rendered or which should have been rendered.[70] In its 1985 adoption of the Rules of Evidence, the supreme court further restricted the medical privilege.[71]

Similarly, Justice Bowling cited section 14 in his dissent in *Jones v. Knight*,[72] where the majority had rejected a challenge to the long-standing doctrine of sovereign immunity. Three short years later, the supreme court abolished sovereign immunity in *Pruett v. City of Rosedale*.[73] Interestingly enough, Justice Bowling did not cite section 14 in his opinion for the court in *Pruett*.

Unlike its federal counterpart in the fourteenth amendment, section 14 of the Mississippi Bill of Rights does not include an equal protection clause. Some states have read equal protection guarantees into the state due process clause, but Mississippi has not done so.[74] Professor Fortenberry commented on the lack of a Mississippi equal protection clause and recommended adding such a provision.[75]

Section 15.

> There shall be neither slavery nor involuntary servitude in this state, otherwise than in the punishment of crime, whereof the party shall have been duly convicted.

Source: 1869: article I, section 19.

Comparable Provision in United States Constitution: amendment XIII.

Commentary: This provision is the same in substance as the

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[70] 1983 Miss. Laws 327.

[71] MISS. R. EVID. 503.

[72] 373 So. 2d 254, 259-60 (Miss. 1979)(Bowling, J., dissenting).

[73] 421 So. 2d 1046, 1051-52 (Miss. 1982).

[74] *See* MISS. CONST. art. VI, § 155 (Mississippi judges take oath "to do equal right to the poor and to the rich."); Sherwin, *Sex Discrimination and State Constitutions: State Pathways Through Federal Roadblocks*, 13 N.Y.U. REV. L. & SOC. CHANGE 115, 120 (1985)(discussion of state courts' reading of equal protection guarantees into state due process clause); *cf.* Bolling v. Sharpe, 347 U.S. 497, 499 (1954)(discrimination denies due process).

[75] Fortenberry, *supra* note 3, at 24.

thirteenth amendment to the Constitution of the United States which abolishes slavery. The thirteenth amendment by its terms applies to the states, because it prohibits slavery "within the United States." Section 15 is patterned on language found in many northern states' constitutions prior to the Civil War. It prohibits not only slavery but also a system of contractual slavery, commonly known as peonage.[76]

Section 16.

Ex post facto laws, or laws impairing the obligation of contracts, shall not be passed.

Sources: 1817: article I, section 19; 1832: article I, section 19; 1869: article I, section 9.

Comparable Provision in United States Constitution: article I, section 10: clause 1.

Commentary: This language is similar to that found in article I, section 10, clause 1 of the federal Constitution, which prohibits states from passing "any bill of attainder, ex post facto law, or law impairing the obligation of contracts." Although section 16 is less frequently relied on today, a survey in 1943 found that twenty-one of the sixty-three Mississippi Supreme Court cases invalidating state legislation under the Bill of Rights had been decided under this section.[77]

The prohibition against ex post facto laws applies only to criminal statutes, not to civil statutes,[78] or to judicial or administrative interpretations of criminal statutes.[79] It prohibits statutes that make criminal innocent acts committed before the adoption of the statute, increase the punishment, or alter certain procedures for conviction.[80] An increase in procedural protec-

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[76] G. ETHRIDGE, *supra* note 18, at 91; *see* State v. Armstead, 103 Miss. 790, 798, 60 So. 778, 780 (1912) (farm labor statute violated § 15).

[77] *See* Howerton, *supra* note 18, at 94 n.41 (results of 1943 survey).

[78] Dunn v. Grisham, 157 So. 2d 766, 768 (Miss. 1963).

[79] Tiller v. State, 440 So. 2d 1001, 1005 (Miss. 1983).

[80] *See* King v. State, 304 So. 2d 650, 650 (Miss. 1974)(ex post facto prohibitions prohibit increase in punishment after crime committed); Hattiesburg Firefighters Local 184 v. City of Hattiesburg, 263 So. 2d 767, 772 (Miss. 1972)(state constitution forbids enactment of ex post facto laws).

tions for criminal defendants may be applied retroactively.[81]

The legislature may also not impair the obligations of contracts. A law which materially increases the amount of property exempt from creditors impairs the obligation of contracts with existing creditors and is unconstitutional as to them.[82] A mortgage moratorium law did not, however, violate section 16 when a state-wide emergency existed and the moratorium law provided procedural safeguards for creditors.[83] Also, for public policy reasons, a marriage contract is not within section 16 and statutes may change grounds for divorce retroactively.[84] Because corporate charters are contracts, sections 178 and 179 of the 1890 constitution expressly grant the authority to amend all post-1890 charters of incorporation. Section 179 does not, however, apply retroactively to pre-1890 charters.[85]

While reaffirming its right to construe section 16 differently from the federal construction of identical language in article I, section 10, clause 1, the Mississippi Supreme Court in *Wilson Banking Co. Liquidating Corp. v. Colvard*[86] stated that it would not invalidate under the state provision a statute valid under the federal provision "unless we are compelled to do so by reason of prior decisions of this court construing such state provision."[87]

Section 17.

> Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated

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[81] Jordan v. State, 464 So. 2d 475, 482-83 (Miss. 1985).

[82] Builders Supply Co. v. Pine Belt Sav. & Loan Ass'n, 369 So. 2d 743, 745 (Miss. 1979).

[83] Wilson Banking Co. Liquidating Corp. v. Colvard, 172 Miss. 804, 818-20, 161 So. 123, 127-28 (1935).

[84] Carson v. Carson, 40 Miss. 349, 352 (1866).

[85] Southern Bell Tel. Co. v. City of Meridian, 241 Miss. 678, 704, 131 So. 2d 666, 675 (1961).

[86] 172 Miss. 804, 161 So. 123 (1935).

[87] *Id.* at 818, 161 So. at 127.

use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public.

Sources: 1817: article I, section 13; 1832: article I, section 13; 1869: article I, section 10.

Comparable Provision in United States Constitution: amendment V.

Commentary: This section parallels the fifth amendment guarantee, but under the Mississippi Constitution the question whether a use is "public" is determined by the courts, not by the legislative body authorizing the taking.[88] Under the federal guarantee, the role of the judiciary is narrow. The United States Supreme Court has insisted on a high degree of judicial deference to a legislative determination that a use is "public."[89]

Another distinction is that section 17 expressly provides compensation for "damages" that do not amount to a "taking," while the fifth amendment does not.[90] Section 17 is self-executing.[91]

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[88] *See* Mississippi Power & Light Co. v. Conerly, 460 So. 2d 107, 110-12 (Miss. 1984)(question of public use is for judiciary rather than legislature). The court has described this as a "vast difference." Pearl River Valley Water Supply Dist. v. Wood, 172 So. 2d 196, 200 (Miss. 1965).

[89] *See* Berman v. Parker, 348 U.S. 26, 32 (1954)(role of judiciary regarding power exercised for public purpose is narrow).

[90] The court has expressly noted and relied on this distinction in holding that an airport zoning ordinance which limited tree heights on nearby land was a compensable "damage" under § 17. Jackson Mun. Airport Auth. v. Evans, 191 So. 2d 126, 131 (Miss. 1966); *see also* Mississippi State Highway Comm'n v. Thomas, 202 So. 2d 925, 926 (Miss. 1967)(leaseholders of lake damaged by dirt washing downstream into lake from road project); Harrison County v. Guice, 140 So. 2d 838, 842 (Miss. 1962)(filling in submerged lands with beach and so cutting off upland owners' access to water would be compensable under § 17 absent ruling that owners had title to beach property).

[91] *See* Runge v. Necaise Constr. Co., 467 So. 2d 666, 669 (Miss. 1985)(appellant's allegation of violation of § 17 combined with absence of prior notice sufficient to support suit for recovery for property damage; chancellor erred in considering provisions of MISS. CODE ANN. § 65-7-61 since § 17 required no ancillary statutory requirements for its application); Walker v. Laurel Urban Renewal Agency, 383 So. 2d 149, 150-51 (Miss. 1980)(interpreting § 17 as requiring submission of question of causation to jury in action for damage to building by property owner against municipality).

Section 18.

> No religious test as a qualification for office shall be required; and no preference shall be given by law to any religious sect or mode of worship but the free enjoyment of all religious sentiments and the different modes of worship shall be held sacred. The rights hereby secured shall not be construed to justify acts of licentiousness injurious to morals or dangerous to the peace and safety of the state, or to exclude the Holy Bible from use in any public school of the state.

Sources: 1817: article I, sections 3-4; 1832: article I, sections 3-4, 1869: article I, section 23.

Comparable Provisions in United States Constitution: article VI, clause 3; amendment I.

Commentary: The rights conferred by this section are in some respects different from those guaranteed by the first amendment. For example, the first amendment has been held to forbid daily Bible reading in the public schools.[92] Section 18 disclaims any such interpretation. The disclaimer is a limit on the state constitution and does not purport affirmatively to authorize Bible reading in the public schools.[93] For this reason it is not in direct conflict with the first amendment. The language in section 18, however, is objectionable to the extent it appears to sanction Bible reading in the public schools and so could mislead religious people into believing section 18 grants them a right that the federal Constitution denies.

The Mississippi Supreme Court has followed first amendment case law in applying section 18 to forbid civil intervention in a church property dispute.[94] It has also relied on section 18 as an "independent" source of authority in cases where the first amendment required the same result. It has held that a court may not deprive a mother of child custody solely because she belongs to a sect where others handle poisonous snakes.[95] Addi-

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[92] Abington School Dist. v. Schempp, 374 U.S. 203, 223 (1963).

[93] *But see* Smith v. State, 242 So. 2d 692, 698 (Miss. 1970)(dictum)(statute prohibiting teaching of evolution violated first amendment, but § 18 makes it proper also to teach that man was created by spontaneous act of God).

[94] Suster v. Williams, 263 So. 2d 537, 542 (Miss. 1972).

[95] Harris v. Harris, 343 So. 2d 762, 764 (Miss. 1977).

tionally, it has recognized the right of a Jehovah's Witness to refuse a blood transfusion.[96]

The statement in this section that "no religious test" shall be required to qualify for office is contrary to section 265 of the Mississippi Constitution of 1890 which provides that no person who denies the existence of a Supreme Being may hold office in the state. The latter provision is probably unconstitutional under the first amendment.[97]

Section 18 is consistent with section 208 of the 1890 Constitution, which provides in part that "no religious or other sect or sects shall ever control any part of the school or other educational funds of this state; nor shall any funds be appropriated toward the support of any sectarian school . . . ." This latter section and section 18 do not prohibit the use of state-owned textbooks in private schools.[98]

Section 19.

This section contained a prohibition against dueling which was removed from the constitution by 1977 Mississippi Laws Chapter 584 and ratified by the electorate in 1978.

Section 20.

> No person shall be elected or appointed to office in this state for life or during good behaviour, but the term of all officers shall be for some specified period.

Sources: 1817: article VI, section 12; 1832: article I, section 30; 1869: article I, section 29.

Comparable Provision in United States Constitution: article III, section 1 provides that in the federal system judges "hold their Offices during good Behavior."

Commentary: Under the 1817 constitution, judges held of-

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[96] In re Brown, 478 So. 2d 1033, 1039 (Miss. 1985).

[97] *See* Torcaso v. Watkins, 367 U.S. 488, 494-95 (1961)(neither state nor federal government can constitutionally force persons to take religious oaths).

[98] Chance v. Mississippi State Textbook Rating & Purchasing Bd., 190 Miss. 453, 462, 200 So. 706, 713 (1941); *see also* State Teachers College v. Morris, 165 Miss. 758, 769, 144 So. 374, 378 (1932)(applying section 208 of 1890 constitution).

fice during good behavior. The 1832 Constitution required that every official, both state and county, be elected, except the clerk of the high court of errors and appeals, and adopted the language of the present section 20.[99] The Mississippi Supreme Court has narrowly defined the persons who hold "office" under this section.[100]

Section 21.

> The privilege of the writ of habeas corpus shall not be suspended, unless when in the case of rebellion or invasion, the public safety may require it, nor ever without the authority of the legislature.

Sources: 1817: article I, section 17; 1832: article I, section 17; 1869: article I, section 3.

Comparable Provision in United States Constitution: article I, section 9, clause 2.

Commentary: This section is identical to the federal guarantee, except that the last phrase makes explicit the implicit assumption under the federal guarantee that the suspending power is vested in the legislature.[101] The rights protected by section 21 include the right to pre-trial release from an illegal order of confinement to a mental institution.[102]

Section 22.

> No person's life or liberty shall be twice placed in jeopardy for the same offense; but there must be an actual acquittal or conviction on the merits to bar another prosecution.

Sources: 1817: article I, section 13; 1832: article I, section 13;

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[99] Drake, *Convention of 1832, supra* note 21, at 361, 364.

[100] *See* Glover v. City of Columbus, 197 Miss. 467, 478-79, 19 So. 2d 756, 757 (1944)(definition of "public officer" requires more than discharging duties that concern public; duties must be continuing, be defined by law and be discharged by him in his own right, not under control of another).

[101] G. ETHRIDGE, *supra* note 18, at 109; *see also* THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 364-65 (Congressional Research Service 1973 & Supp. 1980) [hereinafter cited as ANALYSIS AND INTERPRETATION].

[102] Jaquith v. Beckwith, 248 Miss. 491, 502-03, 157 So. 2d 403, 408-09 (1963).

1869: article I, section 5.

Comparable Provision in United States Constitution: amendment V.

Commentary: This provision is similar to the federal guarantee except that the 1890 Constitution added the requirement that "there must be an actual acquittal or conviction on the merits to bar another prosecution." This language is not found in the fifth amendment which has been interpreted to apply to the states.[103] The federal rule is different and is inconsistent with section 22. Among other things, it includes an interpretation that jeopardy attaches in any jury trial when the jury is sworn, or if the trial is before a judge without a jury, when the first evidence is presented.[104]

This divergence is contrary to the intent of the 1890 revisers of section 22, who changed it to conform to what was then federal law.[105] It has also caused confusion by misleading the Mississippi Supreme Court and causing it to state the applicable federal rule incorrectly.[106]

The language should be removed because it is superseded by federal law. Additionally, it no longer embodies the revisers' ultimate intent and has enhanced confusion in an already difficult area of the law.[107]

The Mississippi Supreme Court has, as a general rule, interpreted the other requirements of section 22 to be consistent with

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[103] *See* Benton v. Maryland, 395 U.S. 784, 787 (1969)(double jeopardy clause of fifth amendment is applicable to states pursuant to fourteenth amendment).

[104] *See* Christ v. Bretz, 437 U.S. 28, 35-36 (1978)(discussing reasons for holding that jeopardy attaches when jury is sworn).

[105] *See* Jones v. State, 144 Miss. 52, 62-63, 109 So. 265, 266 (1926)(intent of § 22 revisers was to reverse former rule that conviction of manslaughter constituted acquittal of murder); *see also* G. ETHRIDGE, *supra* note 18, at 111-12 (intent to conform state constitution to 1890 federal law).

[106] *See* Lightsey v. State, 493 So. 2d 375, 377 (Miss. 1986)(failing to note federal rule different from § 22); Wallace v. State, 466 So. 2d 900, 902 (Miss. 1985)(same); Jones v. State, 398 So. 2d 1312, 1314-15 (Miss. 1981)(describing difference and court's failure to observe it in prior cases); Schwarzauer v. State, 339 So. 2d 980, 982 (Miss. 1976)(no mention of federal rule); Bounds v. State, 271 So. 2d 435, 437 (Miss. 1973)(no mention of federal rule).

[107] *See* Albernatz v. United States, 450 U.S. 333, 343 (1981)("the decisional law in the area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator").

the "linguistically similar" fifth amendment.[108]

Section 23.

> The people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search; and no warrant shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized.

Sources: 1817: article I, section 9; 1832: article I, section 9; 1869: article I, section 14.

Comparable Provision in United States Constitution: amendment IV.

Commentary: This language is essentially that found in the federal guarantee. The Mississippi Supreme Court has held, however, that section 23 may extend greater protection to the individual than does the fourth amendment.

In *Penick v. State*,[109] the court both refused to follow and distinguished the federal consent-to-search rule announced in *Schneckloth v. Bustamonte*.[110] Observing that the federal decision was not unanimous, the Mississippi Supreme Court said, "the words of our Mississippi Constitution are not balloons to be blown up or deflated every time, and precisely in accord with the interpretation the U.S. Supreme Court, following some tortuous trail, is constrained to put upon similar words in the U.S. Constitution."[111]

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[108] *See* Lee v. State, 469 So. 2d 1225, 1228 (Miss. 1985)(Mississippi Supreme Court construes double jeopardy clause of § 22 consistent with that of federal Constitution); Sanders v. State, 429 So. 2d 245, 251-52 (Miss. 1983)(language of Mississippi's double jeopardy clause is substantially similar to that of federal Constitution). *But see* Dycus v. State, 440 So. 2d 246, 260 (Miss. 1983)(Robertson, J., concurring)(suggesting § 22 might be more protective of rights of accused).

[109] 440 So. 2d 547 (Miss. 1983).

[110] 412 U.S. 218 (1973).

[111] *Penick*, 440 So. 2d at 552; *see also* Lee v. State, 489 So. 2d 1382, 1384 (Miss. 1986)("obviously, protections afforded by the constitution of our state may exceed those guaranteed by the federal constitution"); Breckinridge v. State, 472 So. 2d 373, 376 (Miss. 1985)(dictum)(noting authority to adopt independent interpretation of § 23). *But see* Potter v. United States, 362 F.2d 493, 498 n.1 (5th Cir. 1966)(Coleman, J.)(dictum)(since 1922 Mississippi has followed exclusionary rule laid down by United States Supreme Court).

More recently, three justices concurring in a case decided on other grounds, *Stringer v. State*,[112] argued that the Mississippi Supreme Court should construe section 23 independently and reject the federal good faith exception to the rule excluding evidence unlawfully seized. That exception was fashioned by the United States Supreme Court in *United States v. Leon*.[113] In an opinion by Justice James L. Robertson, they said:

> The states, consistent with the Supremacy Clause, U.S. Constitution Article VI, Section 2, have authority to construe their own constitutions in ways not wholly consonant with the U.S. Constitution where the effect of the state's construction is to afford greater protections for the individual. The Supremacy Clause proscribes what a state may do with its own constitution only where the state would afford the individual lesser rights and protections than does the U.S. Constitution.[114]

Historically, the court has recognized that section 23 is "among the chief fundamentals of our system of government."[115] Relying on section 23, the court adopted the exclusionary rule as a matter of state law well prior to the application of the fourth amendment to the states.[116] The court has also cited section 23 in recognizing a tort cause of action against a policeman for willful search of a suitcase without a warrant.[117]

Section 24.

> All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay.

Sources: 1817: article I, section 14; 1832: article I, section 14; 1869: article I, section 28.

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[112] 491 So. 2d 837 (Miss. 1986).

[113] 468 U.S. 897, 922 (1984).

[114] *Stringer*, 491 So. 2d at 847 (Robertson, J., concurring).

[115] Tucker v. State, 128 Miss. 211, 218-19, 90 So. 845, 846 (1922).

[116] *Id.* at 217-18, 90 So. at 845-46.

[117] United States Fidelity & Guar. Co. v. State, 121 Miss. 369, 378, 83 So. 610, 610-11 (1920).

Comparable Provision in United States Constitution: None.

Commentary: This 1817 language has been a part of every Mississippi constitution. Its origin is chapter 29 of the Magna Carta. Thirty-four states have similar provisions.[118] Justice Ethridge called it "[t]he great guarantee of Law and Justice."[119]

The requirement that "all courts shall be open" was intended to forestall the abuses of the English king and his Star Chamber.[120] In *Miles v. Board of Supervisors*,[121] the Mississippi Supreme Court held that a board of supervisors violated this section by excluding an aggrieved party from a hearing.[122] Noting that Star Chamber proceedings were "provocative of injustice and tyranny," it said "the people have a right to know how its judicial, as well as executive officers, perform their duty, and publicity of the acts and doings of court officials serves as a material factor in keeping the stream of justice unpolluted."[123] Although the Mississippi Supreme Court has never considered whether the public may enforce this open trial right, other courts have uniformly held that the language confers an independent right on the public to attend civil and criminal trials.[124]

The provision that "every person for an injury done him shall have remedy by due course of law" was intended to prevent arbitrary suspensions of the law.[125] Courts in a minority of jurisdictions have construed this language to preclude certain

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[118] *See generally* Note, *The Right of Access to Civil Courts Under State Constitutional Law: An Impediment to Modern Reforms, or a Receptacle of Important Substantive and Procedural Rights*?, 13 RUTGERS L.J. 399 (1982)(analyzing construction and purposes of "access to courts" provisions in various state constitutions).

[119] G. ETHRIDGE, *supra* note 18, at 123.

[120] *Id.* at 125-26; *see also* In re Fox, 296 So. 2d 701, 707 (Miss. 1974)(Rodgers, P.J., dissenting).

[121] 33 So. 2d 810 (1948).

[122] *Id.* at 814.

[123] *Id.* at 813 (Smith, C.J., concurring)(citing Sullens v. State, 191 Miss. 856, 874, 4 So. 2d 356, 363 (1941)).

[124] *See* Gannett Co. v. DePasquale, 443 U.S. 368, 414 n.3 (1979)(Blackmun, J., dissenting)(citing state constitutional provisions); Plaquemines Parish Dev. Comm'n v. Delta Dev. Co., 472 So. 2d 560, 566 (La. 1985)(there is common law right of access to judicial records in both civil and criminal proceedings); Daily Gazette Co. v. Committee of Legal Ethics, 326 S.E.2d 705, 710 (W.Va. 1985)(fundamental right of access applies to formal trials as well as judicial and quasi-judicial proceedings).

[125] Note, *supra* note 118, at 402.

legislative restrictions on common law tort remedies, including workers' compensation systems, restrictions on medical malpractice actions, no fault automobile compensation legislation, and statutes of limitations.[126] The Mississippi Supreme Court, however, has not followed these decisions and has held in *Walters v. Blackledge*[127] that "except as to vested rights the legislature has full power to change or abolish existing common law remedies and methods of procedure."[128] *Walters* upheld the constitutionality of the state Workers' Compensation Act.[129] The court has also upheld a special statute of limitations for suits against architects and contractors[130] and the procedures of the Public School Fair Dismissal Act.[131] One recent analysis of similar constitutional provisions in other states has supported the Mississippi approach and argued that these remedy provisions merely guarantee a right of due process in the courts, and do not restrict legislative innovation.[132]

The requirement that "justice shall be administered without sale" has been construed in some states to prohibit the imposition of court fees which are not uniform, are unreasonable, or have no reasonable relation to the services rendered.[133] The Mississippi Supreme Court relied on section 28 of the constitution of 1868, predecessor to section 24, to strike down a statute granting attorneys' fees on appeal to successful appellees in suits initiated by a citizen against a corporation.[134] The court found

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[126] *Id.* at 409-22.

[127] 220 Miss. 485, 71 So. 2d 443 (1954).

[128] *Id.* at 518, 71 So. 2d at 446.

[129] *Id.* at 519, 71 So. 2d at 446; *see also* Brown v. Estess, 374 So. 2d 241, 242 (Miss. 1979)(Mississippi workers' compensation law violates neither state nor federal constitution).

[130] Anderson v. Fred Wagner & Roy Anderson, Jr., Inc., 402 So. 2d 320, 324 (Miss. 1981).

[131] Lamar County School Bd. v. Saul, 359 So. 2d 350, 352 (Miss. 1978).

[132] Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 Or. L. Rev. 35, 67 (1986).

[133] *See* Malin v. LaMoure County, 27 N.D. 140, 145 N.W. 582, 587 (1914)(imposition of court fees is not denial or sale of justice provided they are uniform, reasonable, and have reasonable relation to services rendered); Note, *supra* note 118, at 405-09 (describing cases).

[134] Chicago, St. L. & N.O.R.R. v. Moss & Co., 60 Miss. 641, 648-52 (1882).

the statute's lack of uniformity objectionable.[135]

Section 25.

> No person shall be debarred from prosecuting or defending any civil cause for or against him or herself, before any tribunal in the state, by him or herself, or counsel, or both.

Sources: 1817: article I, section 29; 1832: article I, section 29; 1869: article I, section 30.

Comparable Provision in United States Constitution: amendment VI.

Commentary: This provision and section 26 afford the individual more protection than does the sixth amendment to the United States Constitution because this section guarantees the right to counsel in "any civil cause . . . before any tribunal" in the state. The sixth amendment only provides the right of counsel in criminal proceedings.[136]

The Mississippi Supreme Court has held that section 25, along with section 24, entitles a citizen to represent himself in a civil suit notwithstanding statutes restricting the practice of law to attorneys.[137] A parole revocation hearing, however, has been held not to be a "civil suit" within the meaning of section 25.[138]

Burdens on the right to litigate may infringe section 25. The court has held under section 25 that a party may not be excluded from the courtroom during a trial,[139] and that a statute may not grant a successful appellee attorneys' fees when the statute is restricted to suits by citizens of the state against corporations.[140] The court has held, however, that section 25 did not prohibit restricting to fifteen dollars the attorneys' fees that

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[135] *Id.* at 646-47.

[136] *See* In re Groban, 352 U.S. 330, 332 (1957)(appellants had no constitutional right to assistance of counsel at investigatory proceeding conducted by fire marshal).

[137] Saxon v. Harvey, 223 So. 2d 620, 623 (Miss. 1969).

[138] Mississippi State Probation & Parole Bd. v. Howell, 330 So. 2d 565, 566 (Miss. 1976) *cert. dismissed*, 426 U.S. 955 (1976).

[139] French v. Sale, 63 Miss. 386, 391 (1885).

[140] Chicago, St. L. & N.O.R.R. v. Moss & Co., 60 Miss. 641, 649 (1882); *see also* Standard Life Ins. Co. of Indiana v. Veal, 354 So. 2d 239, 252 (Miss. 1977)(Smith, P.J., dissenting)(contending that imposing punitive damages for defense of insurance claim violated § 25).

an unemployment compensation claimant could pay his attorneys[141] nor does it bar a city from refusing to award a construction contract to a low bidder in litigation with the city on another project.[142]

Section 26.

> In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, to demand the nature and cause of the accusation, to be confronted by the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in all prosecutions by indictment or information, a speedy and public trial by an impartial jury of the county where the offense was committed; and he shall not be compelled to give evidence against himself; but in prosecutions for rape, adultery, fornication, sodomy or crime against nature the court may, in its discretion, exclude from the courtroom all persons except such as are necessary in the conduct of the trial.

Sources: 1817: article I, section 10; 1832: article I, section 10; 1869: article I, section 7.

Comparable Provisions in United States Constitution: amendment V, amendment VI.

Commentary: With the exception of the final phrase permitting exclusion of the public from a courtroom, this language is similar to that found in the federal Constitution. It was not until 1975, however, that the sixth amendment was construed as guaranteeing a defendant the right to do without counsel and to conduct his own defense.[143] Section 26 expressly grants that right. The Mississippi Supreme Court recently held that section 26 gives a defendant the right to make an opening statement in his criminal trial without waiving his right not to testify.[144] A

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[141] Mississippi Employment Sec. Comm'n v. Wilks, 247 Miss. 737, 751, 156 So. 2d 583, 589 (1963).

[142] M.T. Reed Constr. Co. v. Jackson Mun. Airport Auth., 227 So. 2d 466, 468-69 (1969).

[143] Faretta v. California, 422 U.S. 806, 836 (1975).

[144] Trunell v. State, 487 So. 2d 820, 826 (Miss. 1986). The defendant may also present closing argument, even when he has elected not to testify. Jones v. State, 381 So. 2d 983, 993 (Miss. 1980).

defendant's rights under section 26 are violated if his attorney refuses to permit him to testify.[145]

In *Mhoon v. State*,[146] the Mississippi Supreme Court interpreted section 26 as providing to individuals other protections not necessarily found in the federal Constitution. There the court held a capital murder defendant was denied a fair trial when five jurors were related by blood or marriage to law enforcement officers and the foreman was a policeman in uniform.[147] In *Killingsworth v. State*,[148] the court held the defendant's section 26 right to effective assistance of counsel on appeal barred his appointed attorney from withdrawing, even though the sixth amendment permits withdrawal pursuant to procedures outlined in *Anders v. California*.[149] The court said, "[W]e are not bound by the minimum 'federal requirements' of *Anders* and may construe our own Constitution and laws to afford greater protections for an accused."[150] In *Page v. State*,[151] the court said the section 26 right to counsel attached when a defendant has been arrested, released on bond, and had obtained counsel.[152] It held unconstitutional interrogation by informants without counsel present. The court rejected a suggestion based on federal law that the right should not attach until after indictment and arraignment. Because state grand juries may meet infrequently, the court reasoned that following the federal cases would protect a defendant only "after the point where any competent law enforcement officer would long since have obtained a confession or other inculpatory statement."[153]

In two 1985 prejudicial publicity cases, the court claimed

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[145] Colberson v. State, 412 So. 2d 1184, 1186 (Miss. 1982).

[146] 464 So. 2d 77 (Miss. 1985).

[147] *Id.* at 80, 82.

[148] 490 So. 2d 849 (Miss. 1986).

[149] 386 U.S. 738 (1967).

[150] *Killingsworth*, 490 So. 2d at 850-51. The Mississippi Supreme Court has held that § 26 provides a right to counsel, not to the testimony of a psychiatric expert. Phillips v. State, 197 So. 2d 241, 244 (Miss. 1967). The United States Supreme Court has more recently construed the sixth amendment to provide the right to an expert in certain cases. Ake v. Oklahoma, 470 U.S. 68, 86-87 (1985).

[151] 495 So. 2d 436 (Miss. 1986).

[152] *Id.* at 440.

[153] *Id.* at 440 n.5.

that the right to an "impartial jury" in section 26 was "comparable" to that in the sixth amendment but used reasoning more generous to the defendant than that employed in the United States Supreme Court's most recent prejudicial publicity case, *Patton v. Yount*.[154] In *Johnson v. State*,[155] the court found publicity was prejudicial even though it occurred almost two years before trial. In *Fisher v. State*,[156] the court gave weight to the fact that pretrial publicity included matters not admissible at trial and almost every juror on the venire had heard of the case.[157] The *Patton* court rejected similar arguments, saying that time "soothes and erases" and characterizing juror awareness of the case as "essentially irrelevant" absent a showing that the jurors chosen had fixed opinions of guilt or innocence.[158] Neither *Johnson* nor *Fisher* cited *Patton*.

The right to a jury trial under section 26 does not exist with respect to petty offenses. Federal law defines petty offense as one where the authorized imprisonment term is six months or less.[159] The Mississippi Supreme Court has held in a contempt case that when a five month jail term was coupled with a $750 fine, reduction of the fine to $500 was necessary under state law to make the offense one for which no jury trial right attached under section 26.[160] The Mississippi Supreme Court, however, has refused one notable opportunity to depart from federal law. It has declined to construe the phrase "not be compelled to give evidence against himself" in section 26 as being broader than the fifth amendment's restriction on a defendant being "a witness against himself."[161]

In *Globe Newspaper Co. v. Superior Court*,[162] the United

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[154] 467 U.S. 1025 (1984); *see* Fisher v. State, 481 So. 2d 203, 215 n.10 (Miss. 1985)(section 26 rights "comparable" to sixth amendment).

[155] 476 So. 2d 1195 (Miss. 1985).

[156] 481 So. 2d 203 (Miss. 1985).

[157] *Id.* at 220-21.

[158] *Patton*, 467 U.S. at 1027.

[159] Baldwin v. New York, 399 U.S. 66, 69 (1970).

[160] McGowan v. State, 258 So. 2d 801, 802-03 (Miss. 1972).

[161] McCrory v. State, 342 So. 2d 897, 901 (Miss. 1977); *see also* Collins, *supra* note 16, at 387, n.51 (court refused to expand interpretation of § 26 beyond bounds of fifth amendment despite arguably broader language).

[162] 457 U.S. 596 (1982).

States Supreme Court expressly reserved a question whether the last clause in section 26 is constitutional under the first amendment of the United States Constitution.[163] In that case the Court held unconstitutional a mandatory Massachusetts statute requiring the closure of a criminal sex offense trial to the press and public during the testimony of a minor victim. The Court said that a closure must be necessitated by a compelling governmental interest and be narrowly tailored to serve that interest.[164]

Section 27.

> No person shall, for any indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or the military when in actual service, or by leave of the court for misdemeanor in office or where a defendant represented by counsel by sworn statement waives indictment; but the legislature, in cases not punishable by death or by imprisonment in the penitentiary, may dispense with the inquest of the grand jury, and may authorize prosecutions before justice court judges, or such other inferior court or courts as may be established, and the proceedings in such cases shall be regulated by law.

Sources: 1817: article I, section 12; 1832: article I, section 12; 1869: article I, section 31; 1977 Mississippi Laws, chapter 593.

Comparable Provision in United States Constitution: amendment V.

Commentary: The requirement in section 27 that a prosecutor must obtain a grand jury indictment in order to prosecute a crime punishable by death or imprisonment in the penitentiary is similar to that found in the fifth amendment of the United States Constitution. Because the United States Supreme Court has held that the fifth amendment right to a grand jury applies only to the federal government and not to the state,[165] this guar-

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[163] *Id.* at 608 n.22. The Mississippi Supreme Court has construed this clause to permit closure at a trial during the testimony of an 87-year-old rape victim. Davis v. State, 204 So. 2d 270, 272-74 (Miss. 1967).

[164] *Id.* at 606-07.

[165] ANALYSIS AND INTERPRETATION, *supra* note 101, at 905-06 n.12 (citing Hurtado v. California, 110 U.S. 516 (1884)).

antee would not exist in state practice but for section 27.

Section 27 was amended in 1978 both to permit a defendant to waive indictment and to conform it to the renaming of justice court judges.[166] It has been suggested that authorization by section 27 of prosecutions for petty offenses before justice court judges is part of a constitutional scheme that does not require a jury trial in those cases.[167]

Section 28.

> Cruel or unusual punishment shall not be inflicted, nor excessive fines be imposed.

Sources: 1817: article I, section 16; 1832: article I, section 16; 1869: article I, section 8.

Comparable Provision in United States Constitution: amendment VIII.

Commentary: This language is virtually identical to that found in the federal guarantee which applies to the states.[168] In *Solem v. Helm*,[169] the United States Supreme Court applied the eighth amendment and overturned a life sentence without parole for a seventh nonviolent felony.[170] Mississippi defendants have invoked section 28 in challenging the length and severity of their sentences. The Mississippi Supreme Court has generally rejected such claims on the grounds that if the sentence falls within the limits prescribed by the legislature, it survives a section 28 challenge.[171] Indeed, the court's language on occasion has suggested that a sentence within the prescribed statutory limitations is *per*

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[166] 1977 Miss. Laws 593 (ratified November 7, 1978).

[167] Clark v. State, 332 So. 2d 415, 416 (Miss. 1976).

[168] *See* Schilb v. Kuebel, 404 U.S. 357, 365 (1971)(eighth amendment's proscription of excessive bail applies to states through fourteenth amendment).

[169] 463 U.S. 277 (1983).

[170] *Id.* at 303.

[171] *E.g.*, McAdory v. State, 354 So. 2d 263, 266 (Miss. 1978)(where ninety-year sentence was within statutory limitation, sentence was not cruel, unusual, or excessive punishment). In Stewart v. State, 372 So. 2d 257 (Miss. 1979), however, the court held a judge could not impose a 75 year sentence when a jury had refused to impose a life sentence, and 75 years was not reasonably expected to be less than life. *Id.* at 259. *Stewart* overruled *McAdory* on this limited point.

se constitutional.[172] In other cases, however, the supreme court, while deferring to the legislature's authority to prescribe punishment, has recognized that section 28 prohibits the legislature from promulgating statutes fixing cruel and unusual punishments.[173] In *Pressley v. State*[174] the court remanded the case for a hearing to determine the facts concerning a defendant's *Solem* claim.[175]

In the future, section 28 may be asserted by civil defendants assessed with punitive damages claims. One commentator has recently suggested that the eighth amendment prohibition of "excessive fines" may be directly applicable to punitive damages, especially in mass tort litigation where multiple punitive damages awards are assessed against a single defendant.[176] Although this commentator has taken a federal approach to the issue, the section 28 prohibition of "excessive fines" could likewise be asserted to bar excessive or multiple punitive damages awards.

Section 29.

> Excessive bail shall not be required, and all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great.

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[172] *See* McCormick v. State, 279 So. 2d 596, 599 (Miss. 1973)(where sentence imposed does not exceed statutory limits, sentence cannot be either cruel or unusual punishment).

[173] *See* Horton v. State, 374 So. 2d 764, 765 (Miss. 1979)(fixing limits of punishment for crime is function of legislature and not judiciary unless it constitutes cruel and unusual punishment); Peterson v. State, 268 So. 2d 335, 337 (Miss. 1972)(Mississippi Supreme Court has power to strike down statutes allowing capital punishment if they offend either state or federal Constitution); *see also* Sam v. State, 310 So. 2d 923, 927 (Miss. 1975)(Rodgers, J., concurring)(section 28 of Mississippi Constitution and eighth amendment of United States Constitution proscribe judges from imposition of cruel and unusual punishment and legislatures are prohibited from so doing).

[174] 474 So. 2d 612 (Miss. 1985).

[175] *Id.* at 620; *see also* Burt v. State, 493 So. 2d 1325, 1331-32 (Miss. 1986)(Prather, J., dissenting)(fifteen year sentence without parole for recidivist who passed $35 bad check violated § 28 protection against cruel and unusual punishment).

[176] Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986).

Sources: 1817: article I, section 16; 1832: article I, section 16; 1869: article I, section 8.

Comparable Provision in United States Constitution: amendment VIII.

Commentary: This language explicitly provides a nondiscretionary right to bail which has been implied from the less explicit language of the eighth amendment. The exception for capital offenses is not found in the eighth amendment. It is unclear whether the federal requirements of the eighth amendment regarding bail apply to the states.[177] The section 29 prohibition against "excessive bail" requires consideration of forms of pretrial release other than money bail.[178] A "capital offense" is any offense for which the legislature has authorized the death penalty, even when the statute authorizing the penalty is itself unconstitutional.[179] The legislature, however, may not define armed robbery as a "capital offense" for purposes of bail when by statute armed robbery no longer carries the death penalty.[180]

Section 30.

There shall be no imprisonment for debt.

Sources: 1817: article I, section 18; 1832: article I, section 18; 1869: article I, section 11.

Comparable Provision in United States Constitution: None.

Commentary: While the United States Constitution gives Congress the authority to make uniform rules concerning bankruptcies,[181] it does not forbid imprisonment for debt.[182] The fed-

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[177] ANALYSIS AND INTERPRETATION, *supra* note 101, at 906 n.12 (citing Schlib v. Kuebel, 404 U.S. 357, 365 (1971)(dictum)(assuming eighth amendment applies)).

[178] Lee v. Lawson, 365 So. 2d 1019, 1022 (Miss. 1979).

[179] Hudson v. McAdory, 268 So. 2d 916, 923 (Miss. 1972).

[180] Ex Parte Dennis, 334 So. 2d 369, 373 (Miss. 1976); *see* Comment, *Criminal Law—Bail—Capital Offense Exception to Constitutional Bail Guarantee Unaffected by Abolition of Death Penalty*, 44 MISS. L.J. 565, 568 (1973)(in states where capital punishment has been abolished, capital offenses are nonexistent and all crimes are bailable); Collins, *supra* note 16, at 387 n.50 (discussing § 29 and federal guarantees).

[181] U.S. CONST. art. I, § 8, cl. 4.

[182] *Id. But cf.* Williams v. Illinois, 399 U.S. 235, 244 (1970)(equal protection clause prohibits imprisonment beyond statutory maximum if defendant financially unable to

eral statutory scheme is, however, consistent with section 30.

The term "debt" in section 30 includes personal contractual obligations and does not include criminal fines[183] or alimony.[184] The court has repeatedly used section 30 to declare unconstitutional or to construe narrowly statutes imposing criminal penalties for passing bad checks.[185] Criminal penalties may only be applied when the check is given to obtain present or future consideration, not where it is to cover an existing debt.[186]

Section 31.

> The right of trial by jury shall remain inviolate, but the legislature may, by enactment, provide that in all civil suits tried in the circuit and chancery court, nine or more jurors may agree on the verdict and return it as the verdict of the jury.

Sources: 1817: article I, section 28; 1832: article I, section 28; 1869: article I, section 12; 1916 Mississippi Laws, chapter 158.

Comparable Provision in United States Constitution: amendment VII.

Commentary: The seventh amendment guarantees the jury trial right only in a "Court of the United States." Section 31 grants similar rights to a trial by jury in a civil suit in state court. The seventh amendment also limits the federal right to suits involving more than twenty dollars. Section 31 has no such express limit.

Although section 31 expressly grants a right to jury trial in chancery court, the Mississippi Supreme Court has assumed that a jury trial is not available in chancery court. Rights under section 31 are, for example, limited by section 147, the no-rever-

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pay).

[183] Payne v. State, 462 So. 2d 902, 904-05 (Miss. 1984).

[184] Bonds v. Bonds, 409 So. 2d 704, 706 (Miss. 1982)(citing Fancher v. Gammill, 155 Miss. 316, 322, 124 So. 365, 366 (1929)).

[185] *See* Hindman v. State, 378 So. 2d 663, 665 (Miss. 1980)(legislature considered § 30 in drafting bad check statutes so as not to render statute unconstitutional by transgressing constitutional provision); Blakeney v. State, 39 So. 2d 767, 768 (Miss. 1949)(court considered § 30 in construing criminal liability under bad check law); State v. Johnson, 163 Miss. 521, 535, 141 So. 338, 342 (1932)(Worthless Check Act violates § 30 of constitution which prohibits imprisonment for debt).

[186] State v. Johnson, 163 Miss. 521, 531, 141 So. 338, 340 (1932).

sal-for-improper-jurisdiction provision, when a chancellor tries a case without a jury.[187]

Section 31 is the source of the rule that, in reviewing a jury verdict, the Mississippi Supreme Court will look at the evidence in the light most favorable to the prevailing party.[188] That rule does not apply where no jury is impaneled.[189] Section 31, however, does not prevent summary judgment under Mississippi Rule of Civil Procedure 56 when there is no genuine issue of material fact.[190]

Section 31 guarantees the right to a competent, fair and impartial jury,[191] and requires a jury of twelve, not eleven, persons.[192]

Section 32.

> The enumeration of rights in this constitution shall not be construed to deny and impair others retained by, and inherent in, the people.

Sources: 1817: article I, conclusion; 1832: article I, conclusion; 1869: article I, section 32.

Comparable Provision in United States Constitution: amendment IX.

Commentary: This section involves the same rule of construction as found in the ninth amendment. Section 32, like the ninth amendment, is a response to and rejection of the general rule of statutory and constitutional construction that the enumeration of certain items necessarily implies that other items not named are excluded.[193] The section recognizes that "there are other reserved rights retained by or inherent in the people

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[187] McLean v. Green, 352 So. 2d 1312, 1314 (Miss. 1977); *see also* Tideway Oil Programs, Inc. v. Serio, 431 So. 2d 454, 467 (Miss. 1983)(Broom, J., dissenting)(punitive damages are "quasi-criminal" and ought not be awarded in chancery court without jury).

[188] City of Jackson v. Locklar, 431 So. 2d 475, 478 (Miss. 1983); Paymaster Oil Co. v. Mitchell, 319 So. 2d 652, 657 (Miss. 1975).

[189] Davis v. Clement, 468 So. 2d 58, 60 (Miss. 1985).

[190] Brown v. Credit Center, Inc., 444 So. 2d 358, 362 (Miss. 1983).

[191] Marshall Durbin, Inc. v. Tew, 381 So. 2d 152, 154 (Miss. 1980).

[192] Blaine v. Garwood, 339 So. 2d 978, 979 (Miss. 1976).

[193] G. ETHRIDGE, *supra* note 18, at 154.

which the legislature could not impair,"[194] even though these rights are not named specifically in the state Bill of Rights.

Recently, the Mississippi Supreme Court held in *In re Brown*[195] that section 32 protects a state constitutional right to privacy. In the *Brown* decision, the supreme court ruled that this constitutionally-protected right to privacy conferred upon an individual the right to refuse a blood transfusion even in the face of the state's arguments that the transfusion was necessary to keep the individual alive to serve as a witness in a criminal prosecution.[196] Although the petitioner in the *Brown* case was primarily motivated by her religious beliefs against blood transfusions, the supreme court disclaimed any religious aspect to the privacy right it announced, stating that the right of privacy "has no necessary connection with any organized religion nor any personal religious beliefs."[197] Rather, the court stated that "the right to privacy is so personal that its protection does not require the giving of a reason for its exercise."[198]

Section 32, then, provides the courts with authority to elevate unenumerated rights to constitutional status. To date, the use of section 32 in this manner has remained quite limited. The *Brown* case was the first instance in which section 32 had been cited by the court since 1954.

C. Revision of the Mississippi Bill of Rights

1. Provisions similar to federal constitutional guarantees

Of the twenty-seven sections in the Mississippi Bill of Rights, twenty are similar to provisions in the federal Constitution. By any measure, eight of these sections are so fundamental to our system of government that they belong in any state constitution. In fact, the National Municipal League's Model State Constitution expressly includes similar provisions. They are: section 11, freedom of assembly; section 13, freedom of the press;

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[194] *Id.; see* Collins, *supra* note 16, at 412 n.143 (discussing § 32 and retained rights provision in state constitutions).

[195] 478 So. 2d 1033 (Miss. 1985).

[196] *Id.* at 1040-41.

[197] *Id.* at 1040.

[198] *Id.*

section 14, right to due process; section 18, religious freedom; section 22, prohibition of double jeopardy; section 23, regulation of searches and seizures; section 26, protection of the right to counsel, to a speedy and public trial, and to freedom from self-incrimination; and section 29, guarantee of the right to bail.[199]

Any revision should, however, consider altering the text of several of these state provisions. The press clause, section 13, should be rewritten expressly to forbid criminal prosecutions for libel because such prosecutions are obsolete, unconstitutional, and inconsistent with the essential freedom to criticize government. To the due process clause, section 14, should be joined an equal protection clause to give Mississippi state courts full authority to protect minorities from unjust discrimination under state law. Section 18 should be combined with section 208 prohibiting state aid to religious schools. The revision should clarify the misleading language which appears to grant rights denied by federal law. Section 22 prohibiting double jeopardy should be amended to strike confusing language that is inconsistent with the federal guarantee. Finally, the unconstitutional language in section 26 permitting a judge to exclude the public from certain trials in the court's discretion should be deleted. That language is inconsistent with the guarantee in section 24 of open courts and with the important protection which public trials provide as an assurance that justice will be done.

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[199] One indication of significance is the number of times the Mississippi Supreme Court has cited a section. *Shepard's Mississippi Citations* reports that since 1944, the court has most frequently cited § 14, the protection of due process, and § 26, the protection against self-incrimination. The sections of the Bill of Rights, and the number of times each has been cited in post-1944 cases reported in the *Southern Reporter 2d*, are as follows: § 5, power in people—8; § 6, right to alter government—7; § 7, not withdraw from union—0; § 8, citizenship—0; § 9, subordination of military—0; § 10, treason— 1; § 11, free assembly—2; § 12, right to bear arms—1; § 13, free press—15; § 14, due process—168; § 15, no slavery—0; § 16, no ex post facto laws—28; § 17, no taking without compensation—109; § 18, no religious test—10; § 20, offices for limited terms—3; § 21, habeas corpus—2; § 22, double jeopardy—28; § 23, no unreasonable searches—79; § 24, open courts—37; § 25, self-representation—12; § 26, against self-incrimination—189; § 27, grand juries—11; § 28, no cruel and unusual punishment—19; § 29, bail—19; § 30, no imprisonment for debt—4; § 31, civil jury trial—37; § 32, inherent rights—6. Of course, factors other than importance influence the number of citations. Courts seldom need to construe rights deemed so important and clear that they are not challenged. The subordination of the military, stated in § 9, is one example.

The twelve remaining Mississippi provisions similar to provisions in the federal Constitution shine less brightly in the constellation of state constitutional provisions. The prohibition in section 17 against taking property without just compensation duplicates federal rights, but section 17 clearly protects against not only "taking" but also "damage."[200] Section 17 also gives courts full authority to decide the public nature of the use. The prohibition against cruel and unusual punishment found in section 28 gives state courts authority to apply community standards in mitigation of civil and criminal punishments without being bound by the national standards of the federal courts. Both sections 17 and 28 should be retained.

Section 21, protecting the right to habeas corpus; section 27, guaranteeing the right to indictment by grand jury; section 31, granting the right to civil jury trial; and section 32, protecting inherent individual rights, all parallel provisions in the federal Constitution which do not apply to the states. These provisions must and should be included in the state constitution if they are to apply in state courts. Certainly it is useful to guarantee a state right to habeas corpus in order to give state courts the first opportunity to correct an unconstitutional confinement.

Other provisions similar to federal guarantees which are obsolete or useless and need no longer be retained are: section 7, prohibiting withdrawal from the union; section 8, defining state citizenship; and section 16, prohibiting ex post facto laws. The issue of state sovereignty was settled a century ago at Appomattox Courthouse. Federal court decisions now define state citizenship and voting requirements.[201] The section 14 due process clause and the protection of the federal Constitution deal adequately with the issue of ex post facto laws.

Other such sections, while no longer necessary, may be too politically sensitive to remove. The section 10 limitation on the now-unheard-of crime of treason against the state is one example. In an age of nuclear war and massive standing armies, the

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[200] NATIONAL MUNICIPAL LEAGUE, *supra* note 7, at 28.

[201] *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 342 (1972)(durational residence laws are unconstitutional unless state demonstrates that such laws are necessary to promote compelling government interests).

protection of the individual right to bear arms found in section 12 has lost all connection with its original military purpose. Given the popularity of arms, it is also doubtful that any legislation would be passed that would unduly limit the right. The prohibition against slavery in section 15 is entirely unnecessary given the protections allowed by federal constitutional and statutory law. Nevertheless, any attempt to remove these sections might well be misunderstood and doom the revision effort to defeat.[202]

2. *Provisions without federal counterparts*

Seven sections do not parallel federal guarantees. Whether they should be retained depends upon their importance to the constitutional scheme and to the protection of individual rights. Although they have had little impact on litigated cases, sections 5 and 6 state important principles of popular sovereignty. They could be combined and rewritten to remove the language in section 6 which conflicts with the federal supremacy clause. Section 9, which grants civil power through the courts to control the governor's use of the militia, expresses a principle fundamental to representative government. Section 30, prohibiting imprisonment for debt, protects the liberty of the impoverished debtor and stands as an important statement of the primacy liberty has over property in our constitutional system.

Section 20, prohibiting the holding of office except for a fixed term, hardly seems necessary. Whether or not any state officers hold such office depends on other provisions of the constitution.

The development of the due process right under section 14 has made redundant the procedural protections of section 24 which guarantee justice without sale. Deleting section 24 and moving its open court provision to section 11 or to the newly combined sections 5 and 6 would eliminate the remedy language

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[202] In 1960 Fortenberry recommended that § 7, renouncing secession; § 8, defining citizenship; § 15, prohibiting slavery; and § 16, barring ex post facto laws, be dropped as superfluous or obsolete. He also, however, would have abandoned the § 27 guarantee of grand jury indictment and the § 9 subordination of the military. Fortenberry, *supra* note 3, at 22-23.

which has caused mischief in other states and could threaten legislative attempts at tort law reform. Finally, deletion of the right to self-representation in civil cases expressed in section 25 but preserving the right to counsel, would eliminate an example of Jacksonian-era constitutional romanticism that does nothing but mislead the unhappy citizen who fails to heed the adage that self-representation in court means the representative has a fool for a client. The legislature can by statute preserve the right to self-representation with respect to small claims.

These suggested revisions would strengthen the Mississippi Bill of Rights as an independent bulwark of liberty in our federal system. They are consistent with the purposes that justify the existence of state bills of rights. Only by continuing revision can we heed Mr. Jefferson's admonition and safeguard the rights fundamental to the liberties of each new generation.

SECTION 109: DILEMMA OF THE PUBLIC OFFICIAL — AND THE PUBLIC

*John G. Corlew**

I. Introduction

Section 109 of the Mississippi Constitution of 1890 has become one of the most controversial provisions of that archaic document. Virtually ignored for 90-plus years, proposals for amendment to section 109 have been placed before the Mississippi electorate and rejected twice in the past three years.

There appears to be a public perception that section 109 deals broadly with ethical standards of conduct for public officials. To the contrary, it speaks only to the question of a public official contracting with the public body to which he belongs.[1] Although clearly one of the most obvious and serious ways in which a public official might violate the public trust, the contract area is only one of several areas in which the ethical conduct of a public official comes into play. In this sense, section 109 is rather narrow in its scope. However, section 109 is broad and far-reaching in the scope of the possible contractual interests to which it applies.

A growing awareness of the reach of section 109, aided dramatically by the 1981 Mississippi Supreme Court decision of *Cassibry v. State*,[2] led to the two recent attempts of the legisla-

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[1] Miss. Const. art. 4, § 109 reads as follows:

> No public officer or member of the Legislature shall be interested, directly or indirectly, in any contract with the state, or any district, county, city, or town thereof, authorized by any law passed or order made by any board of which he may be or may have been a member, during the term for which he shall have been chosen, or within one year after the expiration of such term.

[2] 404 So. 2d 1360 (Miss. 1981); *see* Note, *Conflict of Interest - Public Officials - A Legislator is Guilty of a Misdemeanor if he has a Direct Interest in a Contract Authorized by the Legislature*, 52 Miss. L.J. 659, 659 (1982)(discussion of *Cassibry* decision).

ture to amend the constitution to more clearly define the reach of section 109. Unfortunately, both proposals were perceived more as efforts to permit contracting between public officials and boards than as efforts to draw a line between those contractual interests which do present potential for violation of the public trust and should be prohibited, and more remote interests which need not be prohibited.[3]

It is submitted that section 109 does extend further than necessary or desirable for the proper safeguarding of the public trust and that it should be amended to allow a clearer definition of its application. Consistent with the concept of a constitution being a lasting document to be amended only infrequently, and that statutory law is the proper mechanism for spelling out details, it would appear that the better approach to addressing the subject matter of public officials and conflicts of interest is to provide a statement of principle in the constitution, with accompanying legislation setting out more precisely appropriate standards of conduct. This is the approach which the legislature adopted in its attempt to address this area in 1984; however, the legislation proposed included more exceptions than standards and was rejected by the voters.[4]

A recognition that the present section 109 is not the sole measure of ethical standards for public officials in Mississippi would be helpful in attempting to address this issue. For example, section 109 does not prohibit a member of a city council from voting to rezone his own property nor from being paid by the owner of a parcel of property to represent him in having the same rezoned. The legislature and the courts have traditionally dealt with such obvious conflicts of interest which do violate the

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[3] *See, e.g.*, Editorial, *Again, Vote 'No'; Voters Face Another Bad Ethics Amendment*, The Clarion-Ledger/Jackson Daily News, Apr. 20, 1986 at G4, col. 1.

[4] Only the constitutional amendment was proposed in 1984. 1984 Miss. Laws 655 simply prohibited contractual relationships between a public official or employee and the governmental entity of which he was a member, and otherwise prohibited misuse of official position for pecuniary benefit. So-called "standards of conduct" legislation had been adopted in 1983 setting out permissible and impermissible interests and conduct on the part of public officials and employees. MISS. CODE ANN. §§ 25-4-101 to -117 (Supp. 1986). Section 25-4-105(3)(a) through (i) specifically exempted certain interests from the statute's prohibitions, all but one of which identified permissible contract interests between public officials or employees and governmental entities.

public trust, even in the absence of a constitutional mandate.[5]

This article will attempt to outline the historical background of section 109, including its adoption and interpretation; the legislative efforts to define its scope; and, briefly, pending litigation concerning the extent of its application. Finally, it will attempt to propose an amendment to section 109, and accompanying standards of conduct, designed to draw a balance between the proper safeguarding of the public trust and the necessity that public officials and employees at all levels of government have some certainty as to that point at which their private interests present sufficient potential for violation of the public trust as to be deemed illegal.

II. Adoption of Section 109 and Judicial Interpretation

The Mississippi Constitutions of 1817, 1832, and 1869 did not have a provision similar to section 109 of the 1890 constitution. The provision which became section 109 was proposed to the 1890 convention by Judge S. S. Calhoon (later elected president of the convention), and was included among proposed amendments dealing with the legislative branch of government.[6]

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[5] *See, e.g.*, Jackson Redevelopment Auth. v. King, Inc., 364 So. 2d 1104, 1111 (Miss. 1978)(held member of redevelopment authority who had conflict of interest could not be counted for purposes of quorum, even though not participating in subject decision); Friedhof v. City of Biloxi, 232 Miss. 20, 25, 97 So. 2d 742, 743 (1957)(resolution voided which would not have passed without vote of member of city council who had direct conflict of interest in subject matter of resolution); *see also* Miss. Code Ann. § 43-35-35 (1972)(prohibiting municipal employee or official from acquiring interest in urban renewal project). None of the foregoing conflict situations are contractual conflicts such as those prohibited by section 109 of the constitution. Section 43-35-35 further provides that where a municipal official or employee acquires property in urban renewal area involuntarily, or happens to have an interest in such property already, the interest must be disclosed in writing to the municipal governing body and the official or employee is prohibited from participating in any action with respect to such property.

[6] Journal of the Proceedings of the Constitutional Convention of the State of Mississippi 1890, 32-33. There was one amendment to the proposal as submitted by Judge Calhoon prior to its adoption. As proposed by Judge Calhoon the amendment read, "No public officer, or member of the Legislature, shall be interested, directly or indirectly, in any contract with the State, or any district, county, city or town thereof, authorized by any law passed during the term for which he shall have been elected, or within one year after the expiration of such term." *Id.* at 313. R.H. Taylor, delegate from Panola County, offered an amendment to insert after the words "law passed" the following: "or order made by the board of which he may be, or may have been a member." *Id.*

It appears certain that Judge Calhoon's proposal was in reaction to corruption and misuse of office experienced during the Reconstruction Era.[7]

The 1890 constitution included other provisions designed to protect the public trust by prohibiting conflicts of interest on the part of public officials. Thus, section 47 prohibited any member of the legislature from accepting a fee for serving as counsel with respect to legislation pending before either House.[8] Section 107 set forth requirements for acquisition of printing, fuel, and other items by the legislature and other departments of government, and prohibited any member of the legislature or officer of any department of government from being interested in any contract providing therefor.[9] Section 188 prohibited any public official from receiving free or discounted railroad or other

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This amendment was accepted and the entire provision approved by the convention. *Id.*

[7] Judge Calhoon, a Hinds County delegate to the convention, had served as circuit judge from 1876 to 1882 and was appointed to the Mississippi Supreme Court in 1900. He wrote an article entitled, "The Cause and Events that Led to the Calling of the Constitutional Convention of 1890," in which he described Reconstruction government as follows:

> The most grotesque ignorance characterized by county and State administration, the most shameless and rapacious peculation, bribery and corruption were familiar to officers, great and small. The public property was the private plunder of those in place, the public honor was the football of the paltriest vagabonds.

Calhoon, *The Causes and Events that Led to the Calling of the Constitutional Convention of 1890*, VI PUBLICATIONS OF THE MISSISSIPPI HISTORICAL SOCIETY 105, 108 (1902). Judge Calhoon had occasion also to comment on § 109 as a member of the Mississippi Supreme Court. In the case of Treen v. State, 92 Miss. 756, 46 So. 252 (1908), Judge Calhoon commented on the argument of one of the appellate attorneys with respect to § 109 as follows:

> Counsel re-enforces [sic] his argument on the face of these laws calling attention to the fact that the real evil to be remedied was the many frauds designed and effected in the allowance of public contracts for purchases and for buildings which characterized the reconstruction times and which antedated the Constitution and the statutes. He also calls attention to the fact that, previous to 1871, there was no express prohibition in the law against any public officer having an interest in a public contract awarded by a tribunal of which he was a member.

Treen, 92 Miss. at 759, 46 So. at 253. For a vivid description of a Reconstruction Era Hinds County Board of Supervisors member contracting with his brother for a bridge which collapsed within a year, see Wells, *Reconstruction and Its Destruction in Hinds County*, IX PUBLICATIONS OF THE MISSISSIPPI HISTORICAL SOCIETY 85 (1906).

[8] MISS. CONST. art. 4, § 47.

[9] MISS. CONST. art. 4, § 107.

transportation passes or tickets.[10] Section 210 prohibited any public officer of the state from being interested in the sale of books, furniture, or other apparatus to public schools.[11] All of these provisions are much more certain in their application than section 109. Section 47 clearly applies only to legislators seeking to influence legislation for personal profit. Sections 107 and 210 apply only to contracts to provide described goods or services to the legislature and public schools, respectively. Section 188 prohibits gifts in the form of free or discounted transportation to public officials.

Section 278 of the 1890 constitution directed that general laws be drafted to put into effect the new provisions of the constitution.[12] The legislature in 1892 enacted a statute in virtually identical language to section 109 of the constitution, making the violation thereof a misdemeanor.[13] This statutory provision remained a part of Mississippi law, in substantially the same form, until repealed by the legislature in 1983 at the time of the adoption of the so-called "standards of conduct" legislation.[14]

Until *Cassibry v. State*,[15] the factual situations calling for the Mississippi Supreme Court to interpret the provisions of section 109, or the statute implementing the same, all involved rather clear-cut circumstances. Thus, in *Noxubee County Hardware Co. v. City of Macon*,[16] the supreme court enjoined the City of Macon from making purchases from a member of its Board of Aldermen. It is clear that the alderman in so doing was contracting with the city of whose board he was a member, in direct violation of section 109 and the operative statute.[17] Like-

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[10] MISS. CONST. art. 7, § 188.

[11] MISS. CONST. art. 8, § 210.

[12] MISS. CONST. art. 15, § 278.

[13] MISS. CODE ANN. § 1229 (1892).

[14] MISS. CODE ANN. § 1305 (1906); MISS. CODE ANN. § 1038 (1917); MISS. CODE ANN. §§ 1069, 1070 (1930); MISS. CODE ANN. §§ 2301, 2302 (1942); MISS. CODE ANN. § 97-11-19 (1972). 1983 Miss. Laws 469, codified at MISS. CODE ANN. §§ 25-4-101 to -117 (Supp. 1986), which repealed § 97-11-19, dealt with the subject of conflicts of interest in a more comprehensive manner than the contractual prohibition of § 109 and § 97-11-19; however, it also purported to allow certain contractual interests on the part of public officers which conflict with the language of § 109.

[15] 404 So. 2d 1360 (Miss. 1981).

[16] 90 Miss. 636, 43 So. 304 (1907).

[17] *Id.* at 641, 43 So. at 305.

wise, in *State ex rel. Stirling v. Board of Levee Commissioners*,[18] the supreme court enjoined the levee board from contracting with a member of the board for legal services, again a situation flying directly in the face of section 109.[19] Implicit in the court's decision in *Miller v. Tucker*[20] is that a member of the Board of Supervisors of Warren County contracted with the county, a direct violation of section 109. The case allowed the State Revenue Agent to recover funds paid the board member while a member of the board and within one year thereafter. The recovery was allowed not only against the contracting board member, but also against the other members of the board who voted for the contractual payment, and their bondsmen.[21] A similar case with the same result is *Golding v. Salter*,[22] involving the sale of commodities by members of a hospital board of trustees to the hospital.[23] *McMullan v. State*[24] involved a quo warranto proceeding seeking to oust the Mayor of Newton for his admitted violation of section 109 with regard to city purchase of supplies from his hardware business during his term of office. The court held in that case simply that removal from office required conviction under the misdemeanor statute implementing section 109 and that since McMullan had not been convicted, the quo warranto action would not lie and he would not be removed from office.[25]

State v. McClinton,[26] involved an indictment of aldermen and employees of the Town of Quitman for sale by two aldermen of supplies to the town in an aggregate amount of $16.13 and, in the case of two employees, of having an interest in a construction contract with the town in the amount of $2,225.00. All four individuals were indicted under Section 21-39-1 of the Mississippi Code, and not under the section 109 statute, that is, Sec-

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[18] 96 Miss. 677, 51 So. 211 (1910).

[19] *Id.* at 677, 51 So. at 211.

[20] 142 Miss. 146, 105 So. 774 (1925).

[21] *Id.* at 196, 105 So. at 783-84.

[22] 234 Miss. 567, 107 So. 2d 348 (1958).

[23] *Id.* at 575-76, 107 So. 2d at 350.

[24] 298 So. 2d 708 (Miss. 1974).

[25] *Id.* at 710.

[26] 334 So. 2d 677 (Miss. 1976).

tion 97-11-19 of the Mississippi Code.[27] The court found the indictments good[28] and compared the provisions of section 21-39-1 with the requirements of section 97-11-19, noting in the process that section 97-11-19 could not be the basis for prosecution of the employees indicted because section 97-11-19 only applies to public officers,[29] not employees. Further, the court noted that a section 97-11-19 violation could only exist as to an interest in a contract authorized while a particular individual was a member of a board, whereas section 21-39-1 prohibits acquisition of an interest in an existing contract which was not authorized by a board of which the individual was a member.[30] Since the language of section 97-11-19 and section 109 are virtually identical, the same reasoning and analysis should apply in the interpretation of section 109, that is, it does not apply to employees and does not prohibit acquisition of an interest in a contract with a public body of which a public officer is a member if he was not a member of the governing board of the public body when the contract was authorized.

There are two other pre-*Cassibry* Mississippi Supreme Court decisions dealing with conflicts of interest, but not dealing with section 109 or the statute implementing it, which are worthy of note. The court in *Friedhof v. City of Biloxi*,[31] held void a resolution adopted by the City of Biloxi which could not have been adopted without the vote of a member of the city council who had a conflict of interest. The case demonstrates that there can be, as discussed above, very serious non-contractual conflicts of interest; in *Friedhof* the resolution which was adopted withdrew a lawsuit which had been filed against city officials, including the city council member in question, seeking recovery of alleged illegal expenditures in the amount of $339,679.22.[32] In

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[27] *Id.* at 677-78.

[28] *Id.* at 679.

[29] *Id.* A "public officer" has been defined as a person appointed or elected to perform a designated duty concerning the public, which duty is prescribed by law and not by contract. Glover v. City of Columbus, 197 Miss. 467, 478, 19 So. 2d 756, 757 (1944); Shelby v. Alcorn, 36 Miss. 273, 288 (1858).

[30] *McClinton*, 334 So. 2d at 679.

[31] 232 Miss. 20, 97 So. 2d 742 (1957).

[32] *Id.* at 25, 97 So. 2d at 743.

Jackson Redevelopment Authority v. King,[33] a member of the Jackson Redevelopment Authority was disqualified to vote (and did not vote) on a particular issue presumably because of a conflict of interest, and, although present, was not allowed to be counted for quorum purposes, causing the actions of the Authority to be of no effect because of the absence of a quorum.[34]

The pre-*Cassibry* cases appear to establish several principles with respect to section 109:

(1) The fairness of the contractual provisions between a public officer and the board of which he is a member is immaterial with respect to whether section 109 has been violated.[35]

(2) The good faith of the public official involved is immaterial.[36]

(3) The non-participation of the public officer in the authorizing of a contract, and absence from the meeting authorizing same, is immaterial as to whether section 109 has been violated.[37]

(4) The performance of a contract entered in violation of section 109 can be enjoined.[38]

(5) Funds expended pursuant to a contract entered in violation of section 109 can be recovered, not only from the public officer who causes the violation by having an interest in the subject contract, but also from other members of a board who approved the contract.[39]

(6) Section 109 applies only to a contractual interest authorized by a board during the time of membership of a particular public official thereon.[40]

(7) Section 109 does not apply to public employees, but

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[33] 364 So. 2d 1104 (Miss. 1978).

[34] *Id.* at 1111.

[35] *Golding*, 234 Miss. at 589, 107 So. 2d at 356; *Board of Levee Commissioners*, 96 Miss. at 685, 51 So. at 211; *Noxubee County Hardware Co.*, 90 Miss. at 640-41, 43 So. at 305.

[36] *Board of Levee Commissioners*, 96 Miss. at 685, 51 So. at 211; *Noxubee County Hardware Co.*, 90 Miss. at 640, 43 So. at 305.

[37] *Board of Levee Commissioners*, 96 Miss. at 685, 51 So. at 211.

[38] *Id.*; *Noxubee County Hardware Co.*, 90 Miss. at 642, 43 So. at 305.

[39] *Golding*, 234 Miss. at 594-95, 107 So. 2d at 359; *Miller*, 142 Miss. at 196, 105 So. at 783-84.

[40] *McClinton*, 334 So. 2d at 679.

only to public officers.[41]

(8) The action of any public body which would not have been authorized but for a vote cast in violation of section 109 is probably void.[42]

(9) A board member with a section 109 prohibited interest cannot be counted for quorum purposes with respect to the public body of which he is a member, at least with respect to action involving the prohibited interest.[43]

The *Cassibry* case signaled the far-reaching sweep of the language of section 109. The contractual interest in question was not between a public officer and the board of which he was a member. The public officer, a member of the legislature, had no position of authority with the contracting state agency; his interest in this respect was as a member of the legislature which appropriated funds to the agency and therefore "authorized" the prohibited contract.[44] Moreover, the public officer had no ownership interest in the corporation which contracted with the public agency, but served as attorney for the corporation.[45] The court stated that the proper inquiry would be whether the compensation of a public officer depended upon payment being made under this contract.[46] If so, he would have a direct interest therein.[47] In short, the court concluded that the legislature "authorized" a contract made by the State Department of Public Welfare when it appropriated funds to that agency, and that Cassibry, a member of the legislature, had an interest in the contract between that agency and a corporation which he served as attorney because his compensation depended upon payments being made pursuant to the contract.[48] He therefore was in violation of section 109 and section 97-11-19.[49] The court characterized the *Cassibry* interest as a direct interest. Although the

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[41] *Id.*

[42] *Friedhof*, 232 Miss. at 25, 97 So. 2d at 743.

[43] *Jackson Redevelopment Authority*, 364 So. 2d at 1111.

[44] *Cassibry*, 404 So. 2d at 1362.

[45] *Id.* at 1367.

[46] *Id.*

[47] *Id.*

[48] *Id.* at 1366.

[49] *Id.* at 1366-67.

court noted that Cassibry voted "aye" on the appropriation bills in question,[50] given the language of section 109 and section 97-11-19, presumably the result would have been the same had he not voted or even had he voted "nay."

The questions raised by *Cassibry* in the minds of public officials at every level of government in Mississippi are endless. Can a legislator also be a public school teacher without violating section 109? What if it is his or her spouse who is the public school teacher? The compensation as a public school teacher depends upon the teacher's contract with a public school district which receives funds from an appropriation of the legislature, thereby "authorizing" the contract. Presumably the legislator-public school teacher would have a "direct" conflict of interest. Would the legislator whose spouse is a public school teacher have an "indirect" conflict of interest? The same questions and analysis apply in the case of a member of a city governing board, or county board of supervisors, who is employed in the municipal or county school system, or whose spouse is so employed. The compensation to the public official or spouse depends upon a contract with the public school district the tax levy for which is ordered by the governing body of the city or the county, thereby "authorizing" the contract. Can a bank employee, or stockholder, serve on a municipal governing body or county board of supervisors which utilizes that bank as a depository? Although the legislature specifically exempted this situation from the criminal statute implementing section 109 as early as 1924,[51] if section 109 means what it says, as the *Cassibry* court indicated it must, any bank depository exception would appear to be unconstitutional as going beyond section 109. Finally, it is noted that *Cassibry* involved a legislator who received $45,000 in payments from a corporation he assisted in organizing and served as attorney, and who had contacts with the public agency which was the corporation's only source of funding.[52] However,

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[50] *Id.* at 1362.

[51] 1924 Miss. Laws 238. This exemption was a part of MISS. CODE ANN. § 97-11-19 (1972) when it was repealed by the legislature in 1983. It is included as one of the exemptions to contracting with a public body in the standards of conduct legislation. MISS. CODE ANN. § 25-4-105(3)(a)(Supp. 1986).

[52] *Cassibry*, 404 So. 2d at 1364, 1365 n.9.

based upon the court's rationale—and the language of sections 109 and 97-11-19—the result would be the same if the legislator, as a private attorney, had only charged $450.00 to prepare incorporation papers for the corporation in question, did not contact the public agency involved, did not know the corporation would contract with any public agency, and would be the same even if he had voted against the appropriation to the public agency which contracted with the corporation, provided however that the legislator-attorney's $450.00 payment depended upon payments being made to the corporation pursuant to its contract with the public agency.

III. The Legislative Response to *Cassibry v. State*

The Mississippi Legislature adopted significant ethics legislation in 1979, establishing the Mississippi Ethics Commission and delegating to it power to handle complaints and investigate public official wrongdoing, and requiring public officials to file financial disclosure statements.[53] In the wake of *Cassibry*, the 1982 legislature amended the ethics legislation to vest authority to issue advisory opinions in the Ethics Commission, obviously contemplating that some answer to the many section 109 questions had to be found.[54] Additionally, the Ethics Commission was charged with responsibility for formulating proposed standards of conduct pertaining to public officials and reporting recommendations with respect thereto to the legislature.[55] The legislature apparently contemplated promulgating such standards as an additional means of addressing the questions raised by section 109, and the 1983 session of the legislature saw that attempt brought to fruition. The standards of conduct legislation[56] adopted by the 1983 legislature expanded the scope of section 109. Instead of applying to just "public officers," it reached out to include, in effect, any person receiving salary, per diem, or expenses in any amount from funds authorized to be expended

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[53] Miss. Code Ann. §§ 25-4-1 to -31 (Supp. 1986).
[54] Miss. Code Ann. § 25-4-17(j)(Supp. 1986).
[55] Miss. Code Ann. § 25-4-17(i)(Supp. 1986).
[56] Miss. Code Ann. §§ 25-4-101 to -117 (Supp. 1986).

by the state or any political entity thereof.[57] Moreover, the legislation spoke not just to contractual conflicts of interest but also to other conflict situations, including any use of an official position to obtain pecuniary benefit,[58] the performing of any service for compensation by which a public servant attempts to influence the decision of a body of which he is a member,[59] performing any service for compensation after termination from public employment with respect to any matter in which the public servant personally participated during the period of his public employment,[60] and use by a public servant of information gained in his official capacity for pecuniary benefit.[61] Unfortunately this legislation also undertook to set forth exceptions to the contractual conflict of interest prohibition set forth in section 109[62] which not only appeared to be unconstitutional in light of section 109, but which also was interpreted as evidence of an intention on the part of the legislature to find a way to circumvent the section 109 contractual conflict of interest prohibition.[63]

If the legislature thought that it had successfully set forth standards of conduct consistent with the requirements of section 109 of the constitution, the Mississippi Ethics Commission did not and on November 9, 1983, it announced a policy of temporarily staying any action on complaints of conflict of interest where such interest would be allowed by the standards of conduct legislation but appeared to be prohibited by section 109 of the constitution. The Ethics Commission policy announcement noted in part as follows:

During its deliberation the Commission determined that the

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[57] The statute applies to a "public servant," a term broadly defined in MISS. CODE ANN. § 25-4-103(o)(Supp. 1986), to include any elected or appointed official, officer, agent, or employee of any governmental entity; or any person receiving salary or expenses from public funds.

[58] MISS. CODE ANN. § 25-4-105(l)(Supp. 1986).

[59] MISS. CODE ANN. § 25-4-105(2)(d)(Supp. 1986).

[60] MISS. CODE ANN. § 25-4-105(2)(e)(Supp. 1986).

[61] MISS. CODE ANN. § 25-4-105(4)(Supp. 1986).

[62] MISS. CODE ANN. § 25-4-105(3)(Supp. 1986), sets forth nine exceptions to the application of the standards of conduct legislation, eight of which deal with the contractual prohibition.

[63] *See, e.g.*, Neville, *Proposed Ethics Amendment to Mississippi's Constitution*, 31 MISS. LAW. 12, 13 (Sept.-Oct. 1984).

> conflict between the Statutes and the Constitution not only places the Commission in a precarious position while attempting to carry out its duties, but many state and local governmental officials as well. Those officials may have interests that are statutorily legal and are not considered to be morally wrong by the general public. However, those same interests may be expressly prohibited by the Constitution.
>
> The impact of the constitutional prohibitions generally affect any individual public official when he/she or his/her spouse is a school teacher or employee of a local school; a professor or employee of any university or junior college; a doctor, nurse, or employee of any hospital which receives Medicaid reimbursement funds; an employee of any state agency or department; an employee of local government in certain cases; an owner or employee of a business receiving any payments from the state or the local government of which the individual or spouse serves; any member of a legal, medical, engineering, architectural or any other professional firm contracting with the state or local government of which the individual or spouse serves; and an owner or employee of any health care facility or business of any type which receives any Medicaid reimbursement funds.[64]

Although announcing a policy of temporarily staying action on complaints, the Ethics Commission did not forego issuing advisory opinions and on November 14, 1983, addressed an opinion to Bennett Malone, a member of the House of Representatives, which highlighted just how far the contractual prohibition of section 109 can extend.[65] Representative Malone inquired as to his status as a member of the Mississippi House of Representatives and an employee of Tri-County Home Health Care, Incorporated, a private non-profit corporation which had signed a Medicaid provider agreement with the Mississippi Medicaid Commission. In calendar year 1982, this corporation had received .76 of one percent (.0076%) of its funds from Medicaid. As a member of the legislature, Representative Malone would be

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[64] Mississippi Ethics Commission, Conflict of Interest: Commission Policy No. 11.1 (Nov. 9, 1983).

[65] Advisory Opinion of Mississippi Ethics Commission to Honorable Bennett Malone (Nov. 14, 1983).

considered a member of a body which had "authorized" the Medicaid provider agreement because of the legislative appropriation of funds to the Medicaid Commission. Due to his employment by a corporation which had this Medicaid provider agreement, Representative Malone in the advisory opinion of the Ethics Commission was in violation of section 109. Conversely, the 1983 standards of conduct legislation included an exception and would not have proscribed this particular interest.[66] It is submitted that the Ethics Commission opinion as to section 109 was correct in light of the language of section 109 and its interpretation by the Mississippi Supreme Court in *Cassibry*. However, it is also submitted that the imposition of a barrier such as this, that is, placing a public official in the position of violating the constitution because of such an infinitesimal conflict is poor public policy.

In any event, given the conflict between the standards of conduct legislation and section 109 of the constitution, the legislature proposed an amendment to section 109 of the constitution in the 1984 session of the legislature.[67] The amendment would have prohibited a public official *or public employee* from having any interest in a contract with the governmental entity of which he is a member.[68] It thus proposed expansion of the coverage of section 109 from just public officers to include public employees, and to any contract, not just those authorized during the tenure of the particular public official or employee. At the same time, it also clearly opened the door for contracts, for example, between legislators and state agencies and between members of city and county governing authorities and other city and county agencies on whose boards they do not serve, for example, the school district. The *Cassibry* relationship would not have violated this clause of the proposed amendment. However, the amendment also included a provision prohibiting a public official or public employee from misusing his official position for pecuniary bene-

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[66] MISS. CODE ANN. § 25-4-105(3)(b)(Supp. 1986).

[67] 1984 Miss. Laws 655; *see* Hafter, *Proposed Ethics Amendment to Mississippi's Constitution*, 31 MISS. LAW. 12, 12 (Sept.-Oct. 1984)(discussing analysis of proposed amendment).

[68] 1984 Miss. Laws 655.

fit.[69] Presumably, the *Cassibry* case would have been covered by this clause of the proposed amendment. Nonetheless, given the suspicions raised by the exceptions included in the 1983 standards of conduct legislation, the Mississippi electorate overwhelmingly rejected the proposed amendment to section 109 at the general election held November 6, 1984.[70]

Again in 1986 the legislature attempted an amendment to section 109. In more words, it appears to have said less.[71] The approach of the 1986 amendment was to prohibit a contract between a public official or employee and the governmental level of which he is a member, but only if such interest would improperly influence the performance of his duties.[72] Additionally, the proposal prohibited official use of public position for pecuniary benefit.[73] The 1986 proposal substituted an essentially subjective determination of violation for the completely objective standard in section 109 as it now reads. Again the voters overwhelmingly rejected the proposed amendment.[74]

IV. Pending Litigation Involving Interpretation of Section 109

Because of the conflict between the standards of conduct legislation and section 109, the Mississippi Ethics Commission determined that a judicial interpretation should be sought. The commission requested that the Attorney General file suit against six public officials whose public-private interests presented six different issues encountered because of the conflict between the standards of conduct legislation and section 109.[75] The Attorney General's office elected to file suit against two public officials,

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[69] *Id.*

[70] *See* Miss. Official and Statistical Reg. 508 (1984-1988)(vote was 251, 742 "For" and 348, 999 "Against").

[71] 1986 Miss. Laws 526.

[72] *Id.*

[73] *Id.*

[74] Interview with Nancy Sulser, Special Projects Officer, Division of Public Lands and Elections, Office of Secretary of State, State of Mississippi (July 2, 1986)(vote was 75,231 "For" and 128,527 "Against").

[75] Affidavit of Ron Crowe, Executive Director of the Mississippi Ethics Commission, (Jan. 15, 1986)(filed in Chancery Court of First Judicial District of Hinds County, Mississippi; Miss. Ethics Comm'n v. Logan, No. 128,919).

and did so in the Chancery Court of the First Judicial District of Hinds County, Mississippi, seeking a declaratory judgment that the private interests of the two officials were in violation of section 109 and, to the extent the 1983 legislation authorized such interests, that this statute was unconstitutional.[76] The Ethics Commission in turn filed its own suit in the Chancery Court of the First Judicial District of Hinds County, Mississippi, naming as defendants the six individuals previously identified to the Attorney General.[77] On March 20, 1986, Chancellor James Arden Barnett entered Findings of Fact and Conclusions of Law and final judgment in the Attorney General's suit. Judge Barnett found that Representative Hillman T. Frazier, while a member of the Mississippi Legislature, had served as a lecturer at Jackson State University, an institution which received funding by appropriation of the legislature to the Board of Trustees of State Institutions of Higher Learning. Therefore, he concluded that Representative Frazier violated section 109 of the constitution because he had a contract with Jackson State University to lecture there and had also served as a member of the Legislature which had "authorized" that contract by appropriating funds to the Board of Trustees of State Institutions of Higher Learning which were disbursed to Jackson State University. The standards of conduct legislation, section 25-4-105(3)(h),[78] provided an exception for Representative Frazier's situation; to the extent that subsection was inconsistent with section 109, Judge Barnett declared the same to be unconstitutional. The other public official involved in the Attorney General's suit, Billy F. Knox, was a member of the Panola County Board of Supervisors and also director and officer of one bank, and officer of a second bank, both of which served as Panola County depositories. This relationship

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[76] *See* Complaint filed in the Chancery Court of the First Judicial District of Hinds County, Mississippi; Mississippi *ex rel.* Pittman v. Frazier & Knox, No. 128,820 (Nov. 15, 1985).

[77] *See* Complaint filed in the Chancery Court of the First Judicial District of Hinds County, Mississippi; Mississippi Ethics Comm'n v. Logan, No. 128,919 (Dec. 2, 1985), *amended*, (Dec. 16, 1985).

[78] MISS. CODE ANN. § 25-4-105(3)(h)(Supp. 1986)(public servant may be compensated by governmental authority which is separate from that authority in which office is held).

was found to be a violation of section 109. Again, the standards of conduct legislation, section 25-4-105(3)(a),[79] provided an exception for Supervisor Knox; to the extent to which this exception was inconsistent with section 109, Judge Barnett declared the same to be unconstitutional. The decision has been appealed to the supreme court by both Representative Frazier and Supervisor Knox.[80]

The Ethics Commission suit also sought declaratory judgment that section 109 had been violated by the six named defendants, and that to the extent the standards of conduct legislation provided exceptions to section 109 it was unconstitutional. Additionally, it sought restitution to the public bodies involved for all public funds received in violation of section 109 after the filing of the action.[81]

The suit named as defendants and identified their conflicting public and private interests as follows:

(1) Donald N. Logan, member of the Board of Aldermen, City of Long Beach, Mississippi, and principal in Long Beach Municipal Separate School District;

(2) James D. Nunnally, member of the Mississippi House of Representatives and teacher in the Benton County School District;

(3) Billy F. Knox, member of the Panola County Board of Supervisors and director and officer of State Bank of Como and officer of Bank of Crenshaw, both of which are Panola County depositories;[82]

(4) Manuel Killebrew, member of the Quitman County Board of Supervisors and teacher in the Quitman County School

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[78] MISS. CODE ANN. § 25-4-105(3)(a)(Supp. 1986) (public servant may be officer of bank).

[80] *See* Frazier & Knox v. Mississippi, *appeal docketed*, No. 57,359 (Miss. Sup. Ct. June 20, 1986).

[81] The Ethics Commission sought restitution of all funds which defendant Purvis, or the corporation in which he was interested, had or might thereafter receive, since the transaction in question was an annual insurance premium payment which had already been paid, and not an ongoing relationship with a particular public body as with the other five defendants. Interview with Ron Crowe, Executive Director, Mississippi Ethics Commission (June 21, 1986).

[82] Because of the ruling involving Knox in the Attorney General's action, he was dismissed from the Ethics Commission suit.

System;

(5) Douglas L. Anderson, member of the Mississippi State Senate and professor at Jackson State University; and

(6) Perrin H. Purvis, member of the Mississippi State Senate and officer of the corporation which provided insurance to the Tombigbee River Valley Water Management District, a public body which receives legislative appropriations.

Additionally, Representative Nunnally's wife was identified as a teacher in the South Tippah County Consolidated School District and his interest in her employment contract was cited as an additional violation of section 109.

On June 27, 1986, Judge Barnett entered Findings of Fact and Conclusions of Law as follows:

(1) Alderman Logan had a direct conflict of interest in violation of section 109 since the Board of Aldermen "authorized" his contract with the Long Beach Municipal Separate School District through orders levying school district taxes;

(2) Representative Nunnally had a direct conflict of interest in violation of section 109 since the legislature "authorized" his contract with the Benton County School District by appropriating funds for the state's public schools; he had an indirect conflict of interest in violation of section 109 as a result of his spouse's employment as a teacher in the South Tippah County Consolidated School District;

(3) Supervisor Killebrew had a direct conflict of interest in violation of section 109 since the Board of Supervisors "authorized" his contract with the Quitman County School System through orders levying school district taxes;

(4) Senator Anderson had a direct conflict of interest in violation of section 109 since the legislature "authorized" his contract with Jackson State University by appropriating funds to the Board of Trustees of State Institutions of Higher Learning for distribution to Jackson State; and

(5) Senator Purvis had a direct conflict of interest in violation of section 109 since the legislature "authorized" the contract of insurance with the Tombigbee River Valley Water Management District and the corporation of which he was an officer by appropriating funds to the District.

Judge Barnett declared subsections (a), (b) and (h) of sec-

tion 25-4-105(3) of the standards of conduct legislation unconstitutional to the extent they were inconsistent with section 109. However, he denied restitution until final adjudication of the constitutionality of the referenced subsections of the standards of conduct law. Four of the defendants have appealed to the Mississippi Supreme Court.[83]

In a suit arising out of Claiborne County, Chancellor Joseph S. Zuccaro entered judgment on October 10, 1986, finding four members of the Claiborne County Board of Education in violation of section 109 because each had a spouse employed in the Claiborne County Schools under a contract "authorized" by the Board of Education. Judge Zuccaro found these relationships to be "indirect" contractual interests under section 109, enjoined further payment to the spouse-employees pursuant to the subject contracts so long as their respective spouse-board members continue to be board members and for one year thereafter, and directed a copy of the judgment to the State Auditor for the purpose of advancing claims for restitution for payments made in violation of section 109.[84]

Given the section 109 language and the broad sweep of *Cassibry*, it would appear that both Judges Barnett and Zuccoro are correct in finding violations of section 109. Certainly the standards of conduct legislation should be held unconstitutional and of no effect to the extent it is inconsistent with section 109.

While some distinction and clarification might come from supreme court consideration of the foregoing litigation, particularly in the area of definition of "indirect" interest, it is suggested that the only realistic way in which to attempt to ameliorate the effects of section 109 in those cases which might be considered as presenting technical and inconsequential conflicts

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[83] *See* Logan v. Mississippi, *appeal docketed*, No. 57,642 (Miss. Sup. Ct. Aug. 26, 1986). Purvis did not appeal. This appeal was consolidated with the *Frazier* appeal. *See supra* note 80 and accompanying text. Editor's Note: Subsequent to this *Journal's* printing deadline, the Mississippi Supreme Court decided these two cases, affirming the lower court's findings of violations of section 109 except with respect to the "indirect" interests presented by Representative Nunnally's wife, and Alderman Logan's "authorization" of his contract in the case of the *mandatory* tax levy for his employer-school district.

[84] Dorsey v. Smith, No. 10,754 (Claiborne County Ch. Ct.). Judge Zuccaro did not mention the standards of conduct legislation in his judgment. Notice of appeal was filed on behalf of defendants on October 30, 1986.

is to amend section 109 to authorize the drawing of such a line, and to implement legislation which carefully sets forth standards which clearly protect the public trust, but which eliminate from the proscription of unconsititutional and illegal the existence of private interests on the part of public officials which do not present a substantial opportunity for violation of the public trust.

V. A Possible Resolution of the Dilemma

Conflict of interest has been described as that area between bribery and graft on the one hand, and the legitimate specific interests of public officials on the other.[85] No person comes to public office or public employment without specific private interests. Nonetheless, the public servant is obligated to always act solely in the interest of the public.[86] Any attempt to define that point at which a public official or employee sacrifices the public interest for his own private interest is fraught with difficulty.

The shortcoming of section 109 is that it ignores the need to define such a point. Its approach is to provide an absolute prohibition against contractual interests, intended to be judged only by an objective standard. The Mississippi Supreme Court clearly pointed this out in *Noxubee County Hardware Co. v. City of Macon*:[87]

> These questions [good faith, intention, and other such considerations] are all utterly immaterial and wholly out of place since the effort is here to have enforced a wise and salutary policy of protection for all the people by the constitution in section 109. Private interests sink utterly out of sight. The public interest is supreme in controversies of this nature.[88]

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[85] Note, *Conflict of Interests: State Government Employees*, 47 VA. L. REV. 1034, 1034 (1961).

[86] *Id.* "The basic idea behind conflict of interests is that a public servant occupies a position of trust and confidence. The idea was borrowed from the common-law rules of trusts and imposed on the public servant the obligation of acting solely in the interests of the cestui que trust, the public." *Id.*

[87] 90 Miss. 636, 43 So. 304 (1907).

[88] *Id.* at 642, 43 So. at 305.

Such an approach is not without merit. In *United States v. Mississippi Valley Generating Co.*,[89] the United States Supreme Court discussed some of the positive aspects of an objective conflict of interest test:

> [T]he statute does not specify as elements of the crime that there be actual corruption or that there be any actual loss suffered by the Government as a result of the defendant's conflict of interest. This omission indicates that the statute establishes an objective standard of conduct, and that whenever a government agent fails to act in accordance with that standard, he is guilty of violating the statute, regardless of whether there is positive corruption. The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor . . . . It attempts to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation.[90]

However, there must be some reasonable definition to the reach of the objective standard. The "indirect" interest standard employed by section 109 has been severely criticized. A Virginia law review article provided the following:

> The indirect financial interest test is at best a vague standard that shows its real weakness in perimeter situations . . . . The corrupt officer has felt its sting, but at the same time many upright officials have been injured in its wake . . . . If courts are judging, and legislatures setting up "ethical" conduct, intention and motives rather than the external act should be the basic consideration . . . . Otherwise, a hollow, sterile and superficial morality, no deeper than exterior appearances, will be the unfortunate result.[91]

Interestingly, the objective standard statute interpreted in *United States v. Mississippi Valley Generating Co.* included an indirect interest prohibition similar to section 109 which was criticized and repealed by Congress as part of legislation which modernized and broadened federal conflict of interest law.[92] The

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[89] 364 U.S. 520 (1961), *reh'g denied*, 365 U.S. 855 (1961).
[90] *Mississippi Valley Generating Co.*, 364 U.S. at 549-50.
[91] Note, *supra* note 85, at 1056.
[92] *Mississippi Valley Generating Co.*, 364 U.S. at 520-21.

repealed statute was replaced by a provision designed to apply only to "substantial" conflict situations. The House of Representatives Report accompanying this legislation stated that:

> The public interest, therefore, requires that the law protect against such conflicts of interest and establish appropriate ethical standards with respect to employee conduct in situations where actual or potential conflicts exist.
>
> It is also fundamental to the effectiveness of democratic government that, to the maximum extent possible, the most qualified individuals in the society serve its government. Accordingly, legal protections against conflicts of interest must be so designed as not unnecessarily or unreasonably to impede the recruitment and retention by the Government of those men and women who are most qualified to serve it.[93]

Qualified individuals should not be asked to accept the confusion of the section 109 dilemma with its conflict between constitution and statutes and the vagueness of its indirect interest provision. Moreover, section 109 does not protect the public interest against conflicts of interest in any area other than contractual. Congress faced exactly the same situation in 1961 when it modernized federal conflict of interest laws, and a report accompanying this legislation stated that:

> The fundamental defect of these statutes as presently written is that: On the one hand, they permit an astonishing range of private interests and activities by public officials which are wholly incompatible with the duties of public office; on the other hand, they create wholly unnecessary obstacles to recruiting qualified people for Government service.[94]

In addition to contractual interests, adequate regulation of conflicts of interest should include: (1) any use of public office for personal benefit; (2) any participation in the governmental decision-making process as to a matter in which the public official has a substantial financial interest; (3) acceptance of gifts or

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[93] H.R. REP. No. 748, 87th Cong., 1st Sess. 6 (1961).

[94] President's Message to Congress on Ethical Conduct in the Government, H. R. DOC. No. 145, 87th Cong., 1st Sess., 107 CONG. REC. 6836 (1961), *reprinted in* 1961 U.S. CODE CONG. & AD. NEWS 1141, 1142.

rewards in exchange for performance of official duties; (4) disclosure of confidential information gained in the course of performance of official duties for private benefit; (5) engaging in other employment which might conflict with official duties; and (6) subsequent to termination of government employment, participation in matters with respect to which a public official or employee had been involved in his public capacity.[95] There are other areas of concern not in the foregoing list, for example, the appearance of public officials in representative capacities before public agencies and the engagement of public officials in representation adverse to public agencies. A constitution is no place to attempt to list and address such concerns. Rather, regulation of conduct is the proper subject matter of legislation which can be readily amended to include areas overlooked, modified when application brings unintended results, and clarified when silence allows the drawing of undesirable conclusions.

If the subject of conflicts of interest is to be included in the Mississippi Constitution, it is suggested that it should apply to all conflict situations and not just to contractual conflicts; and further, that it should embody a straightforward statement of principle which would not require repeated amendments with changing conditions or interpretations. A possible provision might read as follows:

> A person who holds public office or public employment occupies a position of trust and shall in that capacity always act in the interest of the public good, and not for personal or private advantage.

This provision would replace the present section 109 and it is suggested that sections 107, 188, and 210 be repealed as well.[96] It contemplates that more detailed standards be enacted in legislation to deal with the various conflict situations discussed above.

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[95] For citation to a multitude of law journal articles which discuss the various types of conflicts of interest, see Note, *Conflict of Interest - Public Officials - A Legislator is Guilty of a Misdemeanor if He Has a Direct Interest in a Contract Authorized by the Legislature*, 52 Miss. L. J. 659, 661 n.14, 667 n.50 (1982)

[96] *See* Report of the Jackson Young Lawyers Association Constitutional Review Committee 32 (May 1, 1986)(also recommending deletion of some specific conflict of interest provisions in the constitution in favor of general provisions).

It does not direct that the legislature enact such standards. The objective is to state a principle which provides a basis for decision, or action, even in the absence of other criteria. Doubtless, one might argue that such a provision has no "teeth".[97] However, without constitutional provision or statute, the Mississippi judiciary has already voided actions of public bodies on the basis of the non-contractual conflict of interest of a single member.[98] This provision fortifies that precedent. Further, it is to be noted that the present section 109 contains no penalty provision, yet there is no doubt that its violation is a cause for serious concern to all public officials. This is not to argue against specific prohibitions of certain conduct or the inclusion of "teeth" or penalties in the law, but only to demonstrate that once a principle is established, the law will penalize its violation.

The legislature should adopt legislation setting forth standards and prescribing penalties for violations. Not only is this desirable in and of itself, but it also would appear essential to voter approval of any amendment to section 109. The defeat by the voters in 1984 and 1986 of proposed amendments to section 109 can be attributed in large part to the public distrust created by the legislature in the enactment of legislation in 1983 which clearly violated section 109 and which, despite broadening and improving Mississippi law on conflicts of interest in some respects, devoted a substantial amount of attention to setting forth exceptions whereby a public official could contract with the body to which he belonged.[99]

It is suggested that the legislature amend the 1983 standards of conduct legislation by repealing the standards and exceptions outlined in section 25-4-105, and replacing them with standards designed to address those areas discussed above. The following are possible provisions in that regard:

(1) No public servant shall use his official position to obtain

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[97] *See, e.g.*, Column, *An Ethics Amendment Without Teeth Will Never Be Swallowed by Voters*, The Clarion-Ledger/Jackson Daily News, June 15, 1986 at H3, col. 3 (criticism of two recent legislative attempts to amend section 109).

[98] *See, e.g.*, Friedhof v. City of Biloxi, 232 Miss. 20, 26, 97 So. 2d 742, 744 (1957)(finding city resolution void where determinative vote was that of interested official).

[99] MISS. CODE ANN. § 25-4-105 (3)(Supp. 1986).

pecuniary benefit for himself other than that compensation provided for by law, or to obtain pecuniary benefit for any person related to him by blood or marriage within the third degree, computed by the rule of the civil law, or any business with which he is associated.

(2) No public servant, or business with which he is associated, shall be a party to any contract with, make any sale to, or any purchase from, the governmental entity of which such public servant is a member, except with respect to purchase of goods, services and/or public utilities offered to the general public on a uniform basis, and except with respect to contracts awarded in accordance with law for the privilege of keeping as depository the public funds of a governmental entity or the publication of legal notices by a newspaper. This prohibition shall continue for a period of one year after the termination by the public servant of his relationship with the governmental entity.

(3) No person related to a public servant by blood or marriage within the third degree, computed by the rule of the civil law, or business with which he is associated, shall be a party to any contract with, make any sale to, or any purchase from, a governmental entity of which such public servant is a member if the public servant has discretionary responsibility with respect to the authorization of such contract, sale or purchase, except with respect to purchase of goods, services and/or public utilities offered to the general public on a uniform basis, and except with respect to contracts awarded in accordance with law for the privilege of keeping as depository the public funds of a governmental entity or the publication of legal notices by a newspaper.

(4) No member of the Legislature, spouse thereof, or business with which such member or spouse is associated, shall enter a contract with, make any sale to, or any purchase from the state, or a department, agency, board, commission, or other instrumentality of state government, except with respect to purchase of goods, services and/or public utilities offered to the general public on a uniform basis, and except with respect to contracts awarded in accordance with law for the privilege of keeping as depository the public funds of a governmental entity or the publication of legal notices by a newspaper, and except with respect to any contract, sale or purchase determined by the Mississippi Ethics Commission to present a de minimis

conflict of interest in an advisory opinion issued pursuant to Section 25-4-17(j), Mississippi Code of 1972, as amended.

(5) No public servant shall vote, or otherwise exercise discretionary responsibility, with respect to any governmental matter in which he, a business with which he is associated, or person related to him by blood or marriage within the third degree, computed by the rule of civil law, or business with which he is associated, has a substantial financial interest.

(6) No public servant shall solicit or accept any gift, benefit or compensation in addition to that received in his official capacity to influence him in his official duties or reward him for having performed same.

(7) No public servant shall use or disclose confidential information gained in the course of or by reason of his official position or activities to further his own financial interest or that of any other person.

(8) No public servant shall engage in other employment, the duties of which conflict with his public employment or position or which will either impair his independence of judgment as to his official duties or induce him to disclose confidential information gained by him in the course of his official duties.

(9) No present or former public servant shall, during his public employment or service or for a period of one year thereafter, act in a representative capacity for any person with respect to any matter in which he personally exercised discretionary responsibility as a public servant.[100]

Standard (1) is a catchall provision prohibiting the use of public office for pecuniary benefit. It is identical to section 25-4-105(1), except that it substitutes for "relative" the degree of kinship prohibited in the Mississippi nepotism statutes.[101]

Standards (2), (3), and (4) address contractual conflicts of interest. Standard (2) prohibits a public servant from contracting with the governmental entity to which he belongs. Stan-

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[100] *See infra* Appendix A (proposed amendment to section 109 of 1890 Mississippi Constitution); Appendix B (proposed legislation embodying standards of conduct, along with necessary definitions and enforcement or penalty provisions).

[101] MISS. CODE ANN. § 25-1-53 (1972).

dard (3) prohibits a contract between a governmental entity and any person related by blood or marriage within the third degree to a member of that governmental entity who has discretionary responsibility with respect to the contract. Both provisions are broader than section 109 because of the inclusion of employees in addition to public officers and, in the case of Standard (2), the application to any contract, not just those approved by the public official in question. Standard (2) narrows the reach of section 109 by application only to contracts between a public servant and the governmental entity to which he belongs; thus, a public school employee could serve on the governing body of a city or county, despite funds being authorized by that body for expenditure by the public school district. Standard (3) narrows section 109 in the same way, but defines that degree of kinship to a public servant wherein contractual transactions should be prohibited and broadens the section 109 concept from contract authorization to any discretionary function in the contract process. Standard (4) acknowledges that the legislature presents a unique situation because of the influence of legislators on state agencies as a natural by-product of the lawmaking and appropriations process. Thus, members of the legislature are prohibited from contracting with state agencies, except in cases found by the Mississippi Ethics Commission through advisory opinion to present a de minimis conflict. Presumably, the technical conflict of Representative Malone discussed above would be found to present a de minimis situation; however, the situations presented by the cases of Representative Frazier and Senators Anderson and Purvis would be subject to consideration by the Ethics Commission on a case-by-case basis, and it would be hoped that such a process would establish guidelines by which other members of the legislature could govern their actions.[102] Finally, by making the legislative contractual prohibition apply to state agencies, members of the legislature would be allowed to contract with city, county, school district, and other local bodies. A public school teacher or his spouse would not be prohibited from serving in the legislature. An exception was suggested in Standards (2), (3), and (4) for bank depository and publication of

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[102] *See supra* notes 65-66, 78, 80, 83 and accompanying text.

legal notices because these situations have safeguards in that public bids are usually required;[103] in many instances only a single newspaper or bank may be available for publication of legal notices or depository service, and both of these exceptions have been a part of Mississippi statutory law for many years.[104]

Standard (5) is a far broader concept than the section 109 contractual prohibition. It recognizes that a public official or employee may violate the public trust in noncontractual situations. For example, this provision would prohibit a member of a city council from voting to rezone his own property. Unlike section 109, this does not prohibit the existence of the conflict of interest, but rather, it regulates the conduct of the public official or employee in the face of the conflict. It acknowledges that persons in public office have private interests and that, when the public official or employee is called upon to act with respect to a matter which affects his private interest, he must step aside.

Standard (6) prohibits gifts as an inducement to or reward for performance of official duties. Standard (7) prohibits disclosure of confidential information gained in an official capacity for the purpose of financially benefiting any person.[105]

Standards (8) and (9) deal with employment inconsistent with the official duties of a public official or employee. Standard (8) speaks to employment during public tenure and prohibits any such employment which would impair the independence of judgment of the public official or employee.[106] Standard (9) speaks to employment subsequent to termination of public service and prohibits a public official or employee from acting on behalf of any person with respect to a subject matter in which he personally participated in his public role for a period of one year subsequent to his public employment termination.[107]

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[103] *See, e.g.*, MISS. CODE ANN. §§ 27-105-305 (counties) and 27-105-353 (municipalities)(1972).

[104] *See supra* note 51 (discussing bank depository exception); 1975 Miss. Laws 388 (added exceptions for publication of legal notice).

[105] The language of Standards (6) and (7) paraphrases similar provisions of CONFLICT OF INTEREST ACT, COUNCIL OF STATE GOV'T, 1976 SUGGESTED STATE LEGISLATION 97.

[106] The language of Standard (8) is patterned after CONN. GEN. STAT. § 1-84(b)(1977).

[107] The language of Standard (9) is patterned after OHIO REV. CODE ANN. § 102.03(A)(1976).

Certainly there are other conflict of interest areas which the foregoing standards do not address. As noted above, the appearance of public officials in a representative capacity before other public agencies is such a situation. The ethics legislation, section 25-4-27(h),[108] requires that any such representation by a public official before certain state agencies be disclosed as a part of the statement of economic interest required to be filed annually. However, that legislation and these proposed standards do not prohibit such representation. Just as there may be areas not included, the suggested language may on careful analysis, or with experience, reveal unintended results or leave unanticipated loopholes. The framework suggested here is that such standards be adopted by legislation so that those deficiencies could be cured by amendment to the statutory law, not the constitution. The premise of the constitutional provision would be a straightforward statement of principle which should not require change because of unintended applications or unanticipated situations.

VI. Conclusion

Section 109 does present a dilemma for the public official in Mississippi. Its constraints are particularly difficult for the part-time public official — legislators, school board members, members of city councils, and boards of supervisors — who must earn their livelihoods in occupations apart from their public service. Any attempt to regulate conflicts of interest must acknowledge that public officials, and particularly part-time public officials, have private interests. The public trust can be preserved and protected without a prohibition of private interests, as partially imposed by section 109 in the contractual area. The suggestions for resolution of this dilemma outlined herein may not be the best, or even a good, answer. However, without a resolution, this dilemma of the public official will truly become the dilemma of the public. Leaving the problem unresolved guarantees a substantial shrinkage in the number of persons who have the desire and ability to serve in public office and whose private interests

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[108] Miss. Code Ann. § 25-4-27(h)(Supp. 1986).

are not arguably in some way incompatible with that undertaking.[109]

[109] *See Ethics Ruling May Force 10% of Officials Out of Office*, The Clarion-Ledger/Jackson Daily News, July 8, 1986 at B1, col. 1 (Executive Director of Ethics Commission estimated that approximately 10% of Mississippi's public officials may be in violation of section 109).

Appendix A—Proposed Amendment to Section 109

House/Senate Concurrent Resolution No. ____.

A CONCURRENT RESOLUTION TO AMEND ARTICLE 4, SECTION 109, MISSISSIPPI CONSTITUTION OF 1890, TO PROVIDE THAT PUBLIC OFFICE AND EMPLOYMENT ARE A PUBLIC TRUST; AND TO REPEAL ARTICLE 4, SECTION 107; ARTICLE 7, SECTION 188, AND ARTICLE 8, SECTION 210, MISSISSIPPI CONSTITUTION OF 1890, WHICH DEAL WITH CONFLICTS OF INTEREST BY PUBLIC OFFICIALS.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI, TWO-THIRDS (⅔) OF THE HOUSE OF REPRESENTATIVES AND SENATE CONCURRING THEREIN, WHICH TWO-THIRDS (⅔) CONSISTS OF NOT LESS THAN A MAJORITY OF THE MEMBERS ELECTED TO EACH HOUSE, That the following amendment to the Mississippi Constitution of 1890 be submitted to the qualified electors of the state for ratification or rejection at an election to be held on the first Tuesday after the first Monday of November, 1987:

Amend article 4, section 109, Mississippi Constitution of 1890, to read as follows:

> Section 109. A person who holds public office or public employment occupies a position of trust and shall in that capacity always act in the interest of the public good, and not for personal or private advantage.

Amend further the Mississippi Constitution of 1890 by repealing article 4, section 107; article 7, section 188; and article 8, section 210, which deal with conflicts of interest by public officials.

BE IT FURTHER RESOLVED, That the Secretary of State is hereby directed to give public notice of an election in the manner and for the time provided by section 273 of the Constitution with the amendment and the repealers in this resolution being voted on as one amendment since the amendment and the repealers pertain to one subject and an election is hereby called and fixed to be held on the first Tuesday after the

first Monday of November, 1987, for the purpose of submitting this and other amendments to the Constitution to the qualified electors of this state for approval or rejection, said election to be conducted and held as provided by law for statewide general elections.

BE IT FURTHER RESOLVED, That explanation of the amendment and repealers for the ballot shall read as follows:

> This proposed Constitutional amendment and repealers establish as a constitutional principle that public servants must always act in the best interest of the public good and remove certain specific conflict of interest restrictions from the Constitution in favor of the broader statement of constitutional principle.

Appendix B—Proposed Conflict of Interest Legislation

House/Senate Bill No. _____

AN ACT TO AMEND SECTIONS 25-4-103, 25-4-105, 25-4-107, 25-4-109 AND 25-4-19, MISSISSIPPI CODE OF 1972, TO DEFINE PROHIBITED CONFLICTS OF INTEREST WITH RESPECT TO PUBLIC OFFICIALS AND EMPLOYEES; TO PRESCRIBE PENALTIES FOR VIOLATIONS OF THIS ARTICLE AND METHODS FOR ENFORCEMENT OF SAME; TO REPEAL SECTIONS 25-4-111, 25-4-113, 25-4-115 AND 25-4-117, MISSISSIPPI CODE OF 1972; AND FOR RELATED PURPOSES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. Section 25-4-103, Mississippi Code of 1972, is amended as follows:

25-4-103. (1) As used in this article, the words "business," "compensation," "income," "person," "public employee," "public funds," and "public official" shall have the same definitions as set forth in Section 25-4-3, Mississippi Code of 1972, unless the context requires otherwise.

(2) The following definitions apply in this article unless the context otherwise requires:

(a) "Business with which he is associated" means any business in which a person is an officer, director, owner, partner, employee or stockholder, provided, however, a business in which a person owns less that five percent (5%) of each class of stock issued thereby and with respect to which he has not received in excess of one thousand dollars ($1,000.00) income in any calendar year therefrom shall not be deemed a business with which he is associated.

(b) "De minimis conflict of interest" means an interest which would not substantially affect a reasonable public servant in the proper discharge of his official duties. A conflict of interest is "de minimis" when any benefit or detriment accruing to a public servant by reason of his discharge of official duty is by reason of his membership in some profession, occupation, or group and the benefit or detriment is as a member of that profession, occupation or group and no greater than that accruing

to other members thereof.

(c) "Discretionary responsibility" means the power or duty of a public servant by reason of his public office to recommend, render advice, investigate, approve, disapprove, participate by decision, vote on or otherwise substantially affect a governmental decision.

(d) "Governmental entity" means each separate unit of government which has the authority to expend or approve the expenditure of public funds, including a municipality, county, school district, and any other political subdivision or body politic created by statute, ordinance or executive order, and, with respect to the state, any department, agency, board, commission, institution or other instrumentality thereof created by statute or executive order with the authority to expend or authorize the expenditure of public funds.

(e) "Pecuniary benefit" means benefit in the form of money, property, commercial interests or anything else the primary significance of which is economic gain. Expenses associated with social occasions afforded public servants shall not be deemed a pecuniary benefit.

(f) "Public servant" means any public employee or public official.

(g) "Substantial financial interest" means any interest which could result in direct monetary or economic gain or loss to a person but does not include an interest whereby the benefit or detriment accruing to a person is as a member of a profession, occupation or group to no greater extent than any other member thereof.

SECTION 2. Section 25-4-105, Mississippi Code of 1972, is amended as follows:

(1) No public servant shall use his official position to obtain pecuniary benefit for himself other than that compensation provided for by law, or to obtain pecuniary benefit for any person related to him by blood or marriage within the third degree, computed by the rule of the civil law, or any business with which he is associated.

(2) No public servant, or business with which he is associated, shall be party to any contract with, make any sale to, or any purchase from, the governmental entity of which such pub-

lic servant is a member, except with respect to purchase of goods, services and/or public utilities offered to the general public on a uniform basis, and except with respect to contracts awarded in accordance with law for the privilege of keeping as depository the public funds of a governmental entity or the publication of legal notices by a newspaper. This prohibition shall continue for a period of one (1) year after the termination by the public servant of his relationship with the governmental entity.

(3) No person related to a public servant by blood or marriage within the third degree, computed by the rule of the civil law, or business with which he is associated, shall be a party to any contract with, make any sale to, or any purchase from, a governmental entity of which such public servant is a member if the public servant has discretionary responsibility with respect to the authorization of such contract, sale or purchase, except with respect to purchase of goods, services and/or public utilities offered to the general public on a uniform basis, and except with respect to contracts awarded in accordance with law for the privilege of keeping as depository the public funds of a governmental entity or the publication of legal notices by a newspaper.

(4) No member of the Legislature, spouse thereof, or business with which such member or spouse is associated, shall enter a contract with, make any sale to, or any purchase from the state, or a department, agency, board, commission, institution or other instrumentality of state government, except with respect to purchase of goods, services and/or public utilities offered to the general public on a uniform basis, and except with respect to contracts awarded in accordance with law for the privilege of keeping as depository the public funds of a governmental entity or the publication of legal notices by a newspaper, and except with respect to any contract, sale or purchase determined by the Mississippi Ethics Commission to present a de minimis conflict of interest in an advisory opinion issued pursuant to Section 25-4-17(j).

(5) No public servant shall vote, or otherwise exercise discretionary responsibility with respect to any governmental matter in which he, a business with which he is associated, or person related to him by blood or marriage within the third degree, computed by the rule of civil law, or business with which he is

associated, has a substantial financial interest.

(6) No public servant shall solicit or accept any gift, benefit or compensation in addition to that received in his official capacity to influence him in his official duties or reward him for having performed same.

(7) No public servant shall use or disclose confidential information gained in the course of or by reason of his official position or activities to further his own financial interest or that of any other person.

(8) No public servant shall engage in other employment, the duties of which conflict with his public employment or position or which will either impair his independence of judgment as to his official duties, or induce him to disclose confidential information gained by him in the course of his official duties.

(9) No present or former public servant shall, during his public employment or service or for a period of one (1) year thereafter, act in a representative capacity for any person with respect to any matter in which he personally exercised discretionary responsibility as a public servant.

SECTION 3. Section 25-4-107, Mississippi Code of 1972, is amended as follows:

(1) A complaint for violation of this article may be brought by the Mississippi Ethics Commission or the district attorney in the circuit court of the county in which the violation occurred, which shall be the proper venue for such action.

(2) A defendant in any action pursuant to this article shall be entitled to trial by jury, whose verdict must be unanimous.

(3) A defendant found guilty of a violation of this article shall be liable in damages in the amount of the value of any pecuniary benefit accruing to such defendant as a result of his violation of this article and the amount of any damages accruing to a governmental entity by reason thereof. Such damages shall be assessed by the jury in the action brought alleging violation of this article.

(4) Additionally, the court may impose on a defendant found guilty of a violation of this article a civil fine not to exceed ten thousand dollars ($10,000.00).

(5) All damages and fines paid by any defendant pursuant to this article shall be for the use and benefit of the governmen-

tal entity involved in the defendant's violation of this article.

SECTION 4. Section 25-4-109, Mississippi Code of 1972, is amended as follows:

The action hereby established for violation of this article shall be cumulative to any other remedy available at law or in equity and shall not bar prosecution for any violation of the criminal law.

SECTION 5. Section 25-4-19, Mississippi Code of 1972, is amended as follows:

The commission shall have the authority to do the following:

(a) Make investigations, as provided in section 25-4-21, with respect to statements of economic interest filed pursuant to this chapter and with respect to alleged failures to file any statement of economic interest as required pursuant to this chapter;

(b) Request the assistance of the Attorney General, the Performance Evaluation and Expenditure Review Committee, the Department of Audit and any other agency of state government in the conduct of any investigation in which a particular resource of an agency may be needed;

(c) Administer oaths and issue and serve subpoenas upon any witness or for the production of documents before the commission, and such subpoenas may include a protective order requiring confidentiality of the subpoena, the subject matter, and any documents subpoenaed, and such subpoenas shall be enforced by the courts of this state;

(d) Report, as provided in section 24-5-21(e)(iii), to the Attorney General and appropriate district attorney;

(e) Upon a complaint signed under oath by any person, including any member of the Commission or its staff, investigate, as provided in section 25-4-21, any alleged violation of law by public officials or public employees;

(f) Seek, in the name of and for the use and benefit of the State of Mississippi, restitution or other equitable or legal remedies in civil law to recover public funds or property unlawfully taken, as well as any unjust enrichment, although not public funds, and to recover on bonds where the state is the beneficiary;

(g) File and prosecute actions pursuant to Section 25-4-107, Mississippi Code of 1972;

(h) Employ an attorney or attorneys to:

(i) Serve as a special prosecutor to assist the Attorney General or a district attorney upon request approved by the commission; and

(ii) File actions to seek restitution or other remedies as provided in items (f) and (g) of this section.

SECTION 6. Sections 25-4-111, 25-4-113, 25-4-115, and 25-4-117, Mississipi Code of 1972, are hereby repealed.

SECTION 7. This act shall take effect and be in force from and after the date that [House/Senate] Concurrent Resolution No. _____ of the 1987 Regular Session of the Mississippi Legislature is ratified by the electorate.

THE EQUAL PROTECTION CLAUSE AND THE EROSION OF THE THEORETICAL FOUNDATIONS OF BICAMERALISM

*By Paul M. Neville**

I. The Anti-Democratic Theories

Deliberative and policymaking bodies in the public and private experience are almost without exception unicameral in structure. Boards of directors of corporations of all sizes, city and county governments, substructures and entities of all levels of public authority, clubs, churches, and almost all forms of organizations make policy with one body of elected or appointed representatives.

In the United States, this almost uniform practice is deviated from only in the instance of the United States Congress and the legislative bodies of forty-nine states. Nebraska stands alone among the states in adherence to the *norm* of unicameralism.

The decision on legislative structure by the members of the constitutional convention resulting in the United States Constitution was partially the product of compromise.

> There was the advantage of the two kinds of representation that a two-house structure permits in a federal form of government. This advantage was used to break the deadlock between the small and the large states, and thus removed one of the chief obstacles to agreement in the convention. The Virginia Plan proposed that membership in both houses of the legislature be proportionate to population, which would have given

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> control to the larger states. The smaller states countered with the New Jersey Plan of a single chamber in which all the states would have equal voting strength. The Connecticut Compromise used the bicameral form to satisfy the small states with equal representation in the Senate and the larger states with proportionate representation in the House of Representatives.[1]

While a federal compromise may have contributed to the establishment of a bicameral national legislative body, the theoretical foundations of such a structure have a different source.

> Perhaps the strongest consideration in creating an upper house was the belief that the lower house, popularly elected on the basis of population, would be a radical body, likely to encroach on the rights of property. A second chamber, representing the interest of the wealthy and well to do, was to be selected in a different manner, with higher property qualifications for both voters and members.[2]

It is this anti-democratic theory, coupled with the perceived need to protect propertied interests, that is the real theoretical basis for bicameralism.

Alexander Hamilton expressed the sentiments of those among the framers of constitutions in this country who sought to bridge the gap between the ideals of the Declaration of Independence and their perception of the need for social and economic stability for government. He stated:

> All communities divide themselves into the few and the many. The first are the rich and well born, the other the mass of the people. The voice of the people has been said to be the voice of God; and however generally this maxim has been quoted and believed, it is not true in fact. The people are turbulent and changing; they seldom judge or determine right. Give therefore to the first class a distinct permanent share in the government. They will check the unsteadiness of the second, and as they cannot receive any advantage by a change, they therefore will ever maintain good government. Can a democratic assembly who annually resolve in the masses of people be supposed

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[1] A. W. JOHNSON, THE UNICAMERAL LEGISLATURE 26 (1938).

[2] AMERICAN STATE LEGISLATURES: REPORT OF THE AMERICAN POLITICAL SCIENCE ASSOCIATION 48 (B. Zeller ed. 1954) [hereinafter cited as AMERICAN STATE LEGISLATURES].

> steadily to pursue the public good? Nothing but a permanent body can check the imprudence of democracy . . . .[3]

Mr. Hamilton did not get his permanent body (or House of Lords?), but his sentiments were answered by the creation of the Senate. "The necessity of a senate is not less indicated by the propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions and to be seduced by factious leaders into intemperate and pernicious resolution."[4] It is to be remembered that the popular election of United States Senators was not guaranteed until the ratification of the seventeenth amendment. The states, in adopting the form of the national government for their legislatures, put in place various restrictions on membership in and the electorate for the "upper chambers."[5]

It is not the purpose of this article to debate or evaluate the soundness of the anti-democratic theories that are the foundation of bicameralism. I propose to demonstrate that under current law and practice in Mississippi, these theories cannot exist, and that without them, much of the theoretical underpinnings of bicameralism have evaporated.

The spread of universal suffrage through the nineteenth century, the abandonment of property, sex and race restrictions on voting under mandate of the courts, and the application of the equal protection clause of the fourteenth amendment of the United States Constitution to reapportionment of state legislatures have resulted in no distinctions within the electorate or between the memberships of the "upper" and "lower" houses of the state legislatures.

In 1966, a three-judge panel headed by former Governor J.P. Coleman, who had become a circuit judge on the Fifth Circuit Court of Appeals, applied the principles enunciated in a series of United States Supreme Court decisions[6] to invalidate the

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[3] CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION 199 (1969)(quoting Alexander Hamilton).

[4] THE FEDERALIST No. 62, at 418 (A. Hamilton)(J. Cooke ed. 1961).

[5] *See* AMERICAN STATE LEGISLATURES, *supra* note 2, at 47-60 (discussing merits of unicameral and bicameral legislatures).

[6] *See* Swann v. Adams, 385 U.S. 440, 444-45 (1966)(legislative reapportionment plan held not to conform to constitutional requirements); Reynolds v. Sims, 377 U.S. 533, 586

existing apportionment plan of the Mississippi Legislature. In *Connor v. Johnson*,[7] the judicial panel ruled that "the apportionment provisions of the Mississippi Constitution and statutes are contrary to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and are therefore invalid under the Supremacy Clause."[8]

The litigation after the *Connor* decision has now resulted in a Mississippi Legislature that has virtually no distinctions between a member of the house of representatives and a member of the senate.[9] Each member of the legislature is elected from a single-member district by an electorate which is, except for larger numbers in senate districts, identical. They are all elected at the same time for the same term. This homogeneity has resulted in two bodies that function as a redundancy rather than as the classical "check and balance" envisioned by the advocates of bicameralism.

No less an authority than Thomas Jefferson recognized that two houses of a legislature representing the same electorate served no useful purpose, rendering one of them superfluous.[10]

II. The Two Sets of Fools Theory

With bicameralism shorn of its traditional foundations, its supporters advance basically one theory for its continuing value. This theory was recently expressed to this writer in the following terms. A supporter expressed the view that the people of Mississippi were better served by two sets of fools arguing over what to do than they would be by one set of fools possessing all of the legislative authority.

While most advocates of bicameralism will not state the argument in such terms, they mean the same thing when they talk

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(1964)(reapportionment is legislative matter unless legislature fails to reapportion according to federal constitutional requisites); Baker v. Carr, 369 U.S. 186, 204-12 (1962)(federal courts have jurisdiction to hear reapportionment cases).

[7] 256 F. Supp. 962 (D.C. Miss. 1966).

[8] *Id.* at 967.

[9] *See* Miss. Const. §§41, 42 (1890)(age qualification for senate is twenty-five; age qualification for house of representatives is twenty-one).

[10] *See* Arthur N. Holcombe, State Government in the United States 66-70 (1931)(support for bicameral legislature not unanimous).

of preventing foolish legislation and enhancing deliberation.

In its own way, this theory is anti-democratic in nature. Since the people cannot be relied upon to elect responsible representatives, we must institutionalize barriers against efficiency to slow down the process and prevent or at least delay the inevitable bad legislation.

> On the whole the arguments made by bicameralists have not been found convincing. (Footnote omitted). As much as anything, they appear to be rooted in a distrust of the legislature and the representative function. No evidence exists to suggest that bicameral legislatures prevent the passage of hasty and undesirable legislation—the principal claim made for the arrangement.[11]

III. The Problem is Bicameralism

Any person who has ever attempted to get legislation passed by the Mississippi Legislature that is the slightest bit controversial knows the true meaning of the word "frustration." It is like walking into a Byzantine labyrinth to which no one except a select few of the highest legislative leaders have a road map, which they keep hidden from view.

It is my contention that this labyrinth is an inherent by-product of having a bicameral body, although its negative effect in this state could be diminished by a more progressive and responsive leadership. Without that type of legislative leadership, the problems inherent in bicameralism are compounded tenfold because of the leadership's ability to manipulate the complex procedure.

The most asinine manifestation of the evils of bicameralism is the petty jealousy that exists between the two houses.[12] If you

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[11] *See* W. Keefe & M. Ogul, The American Legislative Process 54, 54-56 (2d ed. 1968)(attributes of bicameral legislature).

[12] Austin F. McDonald, American State Government and Administration 165 (1946). In his book, McDonald states:

> Years ago Benjamin Franklin, in urging the retention of Pennsylvania's single-chambered legislature, quoted the fable of the snake who had two heads and one body. She was going to a brook to drink, and on her way was to pass through a hedge, a twig of which opposed her direct course; one head chose to

are successful in getting one house to go along with your measure, this almost constitutes a strike against you in the other body. It will consider the measure with a jaundiced eye when it arrives, just to prove its independent, reasoned approach, in contrast with the "irrationality" of the competing body.

One major problem of bicameralism that presents itself in Mississippi is the conference committee. A conference committee is required under a two-house system to coordinate differing bills from each house to get a final measure that can be enacted into law. It sounds so reasonable.

In practice, however, the conference committee acts as a *third* house of the legislature which is under the direct and total control of the speaker and the lieutenant governor, who appoint, at their discretion, its members.

The legislators appointed to the conference committee may even be opponents of the legislation under consideration. The conference committee meets in secret and is accountable to no one except those responsible for their appointment. The committee can kill legislation simply by failing to agree on reconciling small differences. They can report back legislation that is unlike any measure considered by either house.

With the recent failure of our legislature to consider reducing its size, the economic merits of unicameralism for Mississippi are striking. By limiting the legislature to one house—the size of the present house of representatives—we save the cost of fifty-two members and their entire staff and bureaucracy. The State Department of Audit report indicates the savings last year would have been $2,867,279.34.[13]

The question of minority representation must be addressed in any discussion of this problem for Mississippi. Currently, black representation in the house is seventeen percent and in the senate under five percent.[14] *Total* black representation and

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go on the right side of the twig, and the other on the left, so that the time was spent in the contest, and, before the decision was completed, the poor snake died with thirst.

Id.

[13] STATE DEPARTMENT OF AUDIT REPORT, EXPENSES AND APPROPRIATIONS OF THE MISSISSIPPI LEGISLATURE 21 (Reg. Sess. 1986).

[14] MISSISSIPPI OFFICIAL AND STATISTICAL REGISTER 1984-1988, 113-56.

influence in the legislature is cut in half in Mississippi because of the situation in the senate. If the legislature were one body the size of the present house of representatives, the black *effective* influence would be doubled over the present situation.

I sincerely believe that the people of this state are looking for a new state constitutional convention to boldly explore measures that will alter for the better the way government functions at all levels in this state.

Half-measures will not enable Mississippi to leap ahead into the twenty-first century. A unicameral legislature could very well be one of the tools that would allow this state to get back into effective competition with our sister southern states, if not other states across this country.

THE REVISED MODEL BUSINESS CORPORATION ACT AND CORPORATE LAW REFORM IN MISSISSIPPI: PART ONE

*Wendell H. Holmes**

In 1987, the Mississippi Business Corporation Act[1] (hereinafter MBCA) will mark the first quarter-century of its existence.[2] The age of twenty-five years might seem mere infancy for a major business statute, particularly one that comprehensively supplanted the disconnected corporate statutes that preceded it. Moreover, most corporate practitioners in this state would probably agree that in commonplace transactions the MBCA presents a workable set of rules with which to deal. Thus, one might initially question the necessity (not to say the wisdom) of the notion of corporate law reform which the title of this article advances.

In a sense, however, the MBCA may be considered to be at least thirty-six years old as of the writing of this article. The MBCA was based upon the Model Business Corporation Act, which in 1950 assumed the basic form with which the Mississippi Legislature worked.[3] In turn, the Model Act itself was

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[1] MISS. CODE ANN. §§ 79-3-3 to -293 (Supp. 1985).

[2] For a discussion of the history of the adoption of the MBCA see Hodge & Perry, *The Model Business Corporation Act: Does the Mississippi Version Lime the Bushes?*, 46 MISS. L.J. 371 (1975) [hereinafter cited as Hodge & Perry]

[3] Eisenberg, *The Model Business Corporation Act and the Model Business Corporaction Act Annotated*, 29 BUS. LAW. 1407, 1407-08 (1974) [hereinafter cited as Eisenberg, *Model Act*]. Professor Melvin Eisenberg has noted that the first preliminary draft of the Model Act appeared in 1943; in 1946, the Corporation Law Committee of the American Bar Association promulgated the "Model for State Business Corporation

largely adapted from the Illinois Business Corporation Act of 1933.[4] In some ways, then, the MBCA may have been dated from its very inception.

Since its adoption, however, developments in corporate thinking have rendered the MBCA outmoded in many significant respects. In the areas of formation,[5] corporate management and governance,[6] capitalization and distribution policy, organic changes, and problems of the close corporation,[7] dramatic changes in both statutory and case law have occurred. The significance of those developments alone would suggest the need for a re-examination of the MBCA.

The most significant signpost to a re-evaluation of our statute is, however, the promulgation of the Revised Model Business Corporation Act (hereinafter RMA) in 1984. The RMA represents the culmination of some five years of work by the Committee on Corporate Laws of the Section of Corporation, Banking and Business Law of the American Bar Association. It is the first complete revision of the Model Act for more than thirty years.[8]

Acts"; other revisions followed in 1950, 1953, 1959, and 1969. *Id.* It is noteworthy that by 1969, seven years after the adoption of the MBCA, a new edition of the Model Act had been published which substantially differed from the MBCA in several important respects. *See generally* MODEL BUSINESS CORP. ACT ANN. (2d ed. 1971). Furthermore, substantive revisions continued throughout the next decade, with major changes occurring in 1975, 1976, 1977, 1979, and 1980. 1 MODEL BUSINESS CORP. ACT ANN. xxvi-xxix (3d ed. 1985). This process of revision, coupled with the need for either a new edition or recodification, led ultimately to the adoption of the 1984 Revised Model Business Corporation Act. *See infra* note 8 and accompanying text. For further background of the history of the Model Act see Campbell, *The Model Business Corporation Act*, 11 BUS. LAW. 98 (1956); Garrett, *History, Purpose and Summary of the Model Business Corporation Act*, 6 BUS. LAW. 1 (1950) [hereinafter cited as Garrett].

[4] 1 MODEL BUSINESS CORP. ACT ANN. § 1 (2d ed. 1971). It should be noted that in 1983, Illinois adopted a completely revised business corporation act. Illinois Business Corporation Act of 1983, ILL. REV. STAT. ch. 32, §§ 1.01-17.05 (Supp. 1983), *repealing* ILL. REV. STAT. ch. 32, §§ 157.1-167 (1933). For analyses of the new Illinois legislation see Van Vliet, Jr., *The New Illinois Business Corporation Act Needs More Work*, 61 CHI.-KENT L. REV. 1 (1985); *Symposium on the 1983 Illinois Business Corporation Act*, 1985 U. ILL. L. REV. 635.

[5] *See infra* notes 17-66 and accompanying text.

[6] *See infra* notes 67-318 and accompanying text.

[7] These latter topics will be the subject of Part Two of this article.

[8] REVISED MODEL BUSINESS CORP. ACT ANN. xxiv-xxvi (3d ed. 1985). Several reasons underlie the adoption of the RMA rather than another revision to the 1969 Model Act. First, the Committee on Corporate Laws was considering updating the Model Business

Since the source of Mississippi's general corporate law has now been completely revamped and modernized, the implications of the RMA for the future of Mississippi's corporate law should surely be explored.

Finally, the history of the MBCA since its adoption demonstrates the need for critical re-analysis. Since 1962, only a handful of amendments have occurred, almost all of them technical in nature.[9] Thus, substantive innovations in corporate law since

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Corporation Act Annotated to incorporate changes made since the 1971 edition and its 1973 and 1977 supplements. A third supplement, however, was deemed less practicable than a new edition. *Id.* at xxv. Concurrently, a 1979 study of portions of the Model Act which had not been substantially revised since 1950 suggested numerous areas where the experience of various states indicated that significant simplifications and innovations could be made. *Id.* Among these would be a complete reorganization and renumbering of the Model Act. *Id.* Finally, the process of substantive amendments which had transpired since 1950 had resulted in a document internally inconsistent in format and drafting style. *Id.* Coupled with the need to incorporate post-1977 amendments and the Committee's determination to make further substantive amendments to the Model Act during the drafting process, the decision was made to develop the RMA. *Id.*

An exposure draft of the RMA was circulated for comment in 1983. As will be further discussed herein, the draft differs in many significant respects from the final product. *See* REVISED MODEL BUSINESS CORP. ACT (Exposure Draft March 1983). After the receipt of extensive commentary and a re-analysis and substantial revision of the draft, the final draft was published in 1984. 1 REVISED MODEL BUSINESS CORP. ACT ANN. xxxii-xxxiii (3d ed. 1985). For further background on the RMA see Goldstein, *Revision of the Model Business Corporation Act*, 63 TEX. L. REV. 1471 (1985) [hereinafter cited as Goldstein]; Goldstein & Hamilton, *The Revised Model Business Corporation Act*, 38 BUS. LAW. 1019 (1983); Hamilton, *Reflections of a Reporter*, 63 TEX. L. REV. 1455 (1985) [hereinafter cited as Hamilton, *Reflections*].

[9] The following sections of the Act have been amended: §§ 79-3-15 (reservation of name increased to 180 days); 79-3-25 (increasing fee for service of process on Secretary of State); 79-3-37 (decreasing vote necessary to approve stock options to insiders and not to shareholders generally); 79-3-43 (dealing with facsimile signatures); 79-3-55 (60 days notice of shareholders' meeting); 79-3-57 (closing of transfer books and record date increased to 60 days before meeting); 79-3-67 (directors must be 18); 79-3-103 (single incorporator for professional corporation); 79-3-107 (eliminated publication requirement for certificate of incorporation); 79-3-119 (exempted regulated utilities); 79-3-123 (eliminated publication requirement for articles of amendment); 79-3-141 (allows conversion of shares of merging corporations into shares of corporation other than survivor); 79-3-142 (merger of domestic corporations and business trusts); 79-3-147 (eliminated publication requirement for articles of merger or consolidation); 79-3-149 (eliminated publication requirement for merger of subsidiary corporation); 79-3-159 (broadened dissenters' rights to include business combination as defined in 79-25-3(e)); 79-3-163 (eliminated publication requirement for articles of dissolution); 79-3-189 (various amendments involving administrative suspension and dissolution); 79-3-209 (various amendments dealing with survival of remedies); 79-3-249 (technical amendments dealing with annual reports); 79-

1962 have gone largely ignored. Moreover, a cursory glance at the *Mississippi Digest* and the Annotations to the Mississippi Code of 1972 illustrate dramatically the paucity of judicial interpretation of the MBCA. As a result, significant ambiguities in the Model Act which have been identified and extensively litigated in other jurisdictions still plague Mississippi practitioners, who have no authoritative precedent to guide them.[10] Moreover, Mississippi has little precedent on many common-law corporate issues which have in recent years been increasingly dealt with by statute.[11] Finally, the only article critically analyzing the MBCA previously published in this *Journal* was of limited scope and is now more than ten years old.[12] The purpose of this article, then,

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3-251 (technical amendments involving filing of annual reports); 79-3-253 (minor wording change regarding fee collection); 79-3-255 (changing filing fees); 79-3-257 (changing miscellaneous charges); 79-3-259 (deleted penalty for failure to file annual report); 79-3-269 (changed disposition of fees, charges and penalties).

[10] *See, e.g., infra* notes 55-66 and accompanying text. Of course, an important goal of the drafters of the RMA was to respond to and clarify those ambiguities.

[11] *See, e.g., infra* notes 99-173 and accompanying text. In addition, that authority which does exist is, in some instances, confusing and outdated. The notorious example is Knox Glass Bottle Co. v. Underwood, 228 Miss. 699, 89 So. 2d 799 (1956), *cert. denied*, 353 U.S. 97 (1957), the leading Mississippi opinion on director conflicts of interest. *See* Hodge & Perry, *supra* note 2, at 386-90 (strict interpretation of opinion does not coincide with commercial practices or practicalities); Comment, *Transactions Between a Corporation and its Directors: Where Does Mississippi Stand?*, 52 MISS. L.J. 877, 889-95 (1982)(decision leaves many questions unanswered) [hereinafter cited as Comment, *Transactions*]. *Knox Glass* and general questions of director conflicts of interest are discussed more fully at *infra* notes 141-73 and accompanying text.

[12] *See supra* note 2. The authors of that article eschewed any effort at a comprehensive re-appraisal, focusing instead on four subjects: provisions designed to protect creditors; provisions designed for the protection of shareholders; provisions designed for the regulation of transactions with officers and directors; and provisions dealing with the protection of officers and directors. Hodge & Perry, *supra* note 2, at 373-75.

As of the writing of this article, the only other published article dealing primarily with the MBCA is McLendon, *Formation, Operation and Dissolution of Business Corporations*, 39 MISS. L.J. 281 (1963), a summary of provisions of the then newly-adopted MBCA. Other works dealing with the MBCA in some context include Dunn-Cooper, *An Analysis of Mississippi's Treatment of Foreign Corporations*, 55 MISS. L.J. 259 (1985); O'Neal, *Preventative Law: Tailoring the Corporate Form of Business to Ensure Fair Treatment of All*, 49 MISS. L.J. 529 (1978) [hereinafter cited as O'Neal, *Preventative Law*]; Comment, *Appreciated Property as a Source of Dividends: Its Use and Effects in Mississippi*, 48 MISS. L.J. 309 (1977); Comment, *Valuation of Shares in a Closely-Held Corporation*, 47 MISS. L.J. 715 (1976); Comment, *Oppression of Minority Shareholders: A Proposed Model and Suggested Remedies*, 47 MISS. L.J. 476 (1976). Other works dealing with prior Mississippi corporate laws include Roberds, *The New Corporation Act*, 2

is to examine selected portions of the RMA with a view towards suggested revisions to the Mississippi Act. One point should be made at the outset: this article does not advocate the wholesale adoption of the RMA in Mississippi. Specific reasons for this will be discussed in the context of the provisions of the RMA, but some philosophical rationales can be noted here. By admission of its authors, the RMA is meant to synthesize the recent experience of corporate drafters in "important commercial states."[13] It may be fairly characterized as perpetuating the trend towards "permissiveness" that has been the dominant theme in corporate legislation following the adoption of the 1950 Model Act.[14] I would not presume to resolve conclusively the ac-

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Miss. L.J. 179 (1929) [hereinafter cited as Roberds]; Comment, *The Power of an Equity Court in Mississippi to Dissolve a Corporation*, 15 Miss. L.J. 150 (1943).

[13] 1 Revised Model Business Corp. Act Ann. xxiv (3d ed. 1985).

[14] *See, e.g.*, Branson, *Countertrends in Corporate Law: Model Business Corporation Act Revision, British Company Law Reform, and Principles of Corporate Governance and Structure*, 68 Minn. L. Rev. 53, 62 (1983)(arguing that in large part due to the Model Act, the enabling philosophy of corporate law has become dominant and the protection of shareholders abandoned as a major goal of corporation act drafters) [hereinafter cited as Branson, *Countertrends*]. Professor William Cary has noted that the original Model Act was intended to serve as an alternative to the "permissive" Delaware approach, which the Model Act drafters believed to afford insufficient protection to investors. Cary, *Federalism and Corporate Law: Reflections on Delaware*, 83 Yale L.J. 663, 665 (1974)[hereinafter cited as Cary, *Federalism*]. Cary believed that the process of amendment to the Model Act over the years represented a conscious effort to "out-Delaware Delaware." *Id.*; *cf.* Garrett, *supra* note 3, at 7 (stating that the 1950 Model Act may not appeal to states soliciting corporate business). Professor Eisenberg has noted that the committee responsible for the Model Act was composed overwhelmingly of management lawyers, and that management-oriented changes to the Act took place for many years with little or no comment from its drafters, *e.g.*, the change from mandatory to permissive cumulative voting in 1955. Eisenberg, *Model Act, supra* note 3, at 1410, 1414-15.

In general, criticism of the trend towards permissive, or management-oriented statutes, as opposed to regulatory, or investor-protective statutes, has been thematic in recent corporate scholarship. *See, e.g.*, Bishop, *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers*, 77 Yale L.J. 1078, 1081 (1968)(practice of protecting corporate executives against litigation and liability has been carried as far as it should be and perhaps further) [hereinafter cited as Bishop, *Sitting Ducks*]; Branson, *Countertrends, supra* note 14, at 53-62 (corporate law no longer has protection of shareholders at heart); Bulbulia & Pinto, *Statutory Responses to Interested Director Transactions: A Watering Down of Fiduciary Standards?*, 53 Notre Dame L. Rev. 201, 220-22 (1977)(statutory changes may work to disadvantage of minority shareholders) [hereinafter cited as Bulbulia & Pinto]; Cary, *Federalism, supra*, at 665-66 (shareholders rights watered down to thin gruel); Eisenberg, *Model Act, supra*

ademic debate as to the desirability of permissive rather than regulatory statutes; at a minimum the RMA displays a large corporation orientation which in some instances would be clearly inappropriate, or at least unnecessary, in Mississippi, where the vast majority of domestically chartered corporations are closely-held.[15]

Thus, the methodology of this article is to compare the treatment of selected issues under the RMA and the MBCA in an effort to identify those areas of Mississippi's law in need of revision. This process, however, does not inevitably lead to the conclusion that the RMA should be adopted. Rather, the purpose of this article is to suggest the most desirable approach to specific issues, whether the approach is that taken by the RMA, the current MBCA, or the statutes of other states.

The potential scope of such an undertaking would, of course, be vast, since many of the myriad issues discussed herein would individually merit article-length treatment. This article, which will appear in two parts, is in the nature of an overview, suggesting subjects for further exploration and refinement. With the caveat that attempts at categorization may be arbitrary and of necessity overlap, Part 1 of this article will address the question of corporate law reform in Mississippi in the areas of corporate formation and organization and corporate management and governance. Part 2, to be published in a subsequent issue, will

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note 3, at 1410, 1427-28 (severe imbalance of management lawyers in committee composition); Comment, *Law for Sale: A Study of the Delaware Corporation Law of 1967*, 117 U. PA. L. REV. 861, 872-75 (1969)(three-way arrangement of corporate structures has led to increased management power at expense of public shareholder). Of course, this view has itself been questioned and criticized. *See, e.g.*, Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U.L. REV. 913, 916-21 (1982)(theoretical and empirical evidence does not support attack on separation of ownership and control) [hereinafter cited as Fischel, *Reflections*]; Hetherington, *Redefining the Task of Corporation Law*, 19 U.S.F.L. REV. 229, 235-248 (1985)(assumptions regarding traditional corporate model were largely mistaken).

A related but broader issue is that of the respective roles of management and shareholders in corporate governance and the necessity *vel non* of stricter standards of conduct for managers. This will be further developed at *infra* notes 67-173 and accompanying text.

[15] Indeed, Professor O'Neal has noted the possible "big business bias" of the MBCA, based as it is on the Model Act and made applicable to both large and small corporations. O'Neal, *Preventative Law*, *supra* note 12, at 534 n.24.

discuss the areas of capitalization, organic changes, and issues of particular concern to close corporations.

I. Formation and Organization

A. Process of Incorporation

Among the most salutary changes which would be effected by the RMA are those in the area of corporate formation. In general, the RMA would effectively accomplish three objectives: (1) streamlining and simplifying a procedure that is currently unjustifiably cumbersome; (2) responding to interpretative issues that arose under the Model Act; and (3) clearly defining the legal role of the Secretary of State in the incorporation process.

The MBCA follows a very traditional statutory scheme of incorporation: articles of incorporation including prescribed information[16] must be signed and verified by two incorporators[17] and duplicate originals delivered to the Secretary of State.[18] Assuming that the Secretary determines that the articles "conform to law," the certificate of incorporation is issued and returned together with a duplicate original of the articles.[19] Although the publication requirement was eliminated in 1983,[20] the certificate must be recorded in the chancery clerk's office in the county of the corporation's principal place of business.[21] Upon issuance of the certificate, the corporation is deemed to exist.[22]

The thrust of Chapter 1 of the RMA is twofold: to eliminate much of what is unnecessary under traditional statutes such as the MBCA, and to provide needed clarification and definition to much that previously was unstated or ambiguous. For example, under the RMA only one incorporator is required, and the incor-

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[16] Miss. Code Ann. § 79-3-105 (1972).

[17] Miss. Code Ann. § 79-3-103 (1972). The incorporators must be natural persons of the age of 21. *Id.*

[18] Miss. Code Ann. § 79-3-107 (1972).

[19] *Id.*

[20] 1983 Miss. Laws 403, § 2, *amending* Miss. Code Ann. § 79-3-107 (1972).

[21] Miss. Code Ann. § 79-3-01 (1972).

[22] Miss. Code Ann. § 79-3-109. As to the relationship of this section to common law doctrines of de jure and de facto corporations and corporation by estoppel see *infra* notes 53-66 and accompanying text.

porator can be either a person or an entity.[23] Only one original and one conformed copy need be filed,[24] and the articles need not be verified.[25] The prescribed information in the articles is greatly reduced,[26] and the corporate existence made perpetual unless otherwise provided.[27] There is no necessity to include a purpose clause unless a more limited purpose than the transac-

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[23] REVISED MODEL BUSINESS CORP. ACT §§ 1.40, 2.02 (1984). Given the purely formal and limited nature of the incorporator's role under modern statutes, and the pervasive use of corporation service companies in interstate incorporation transactions, there appears no need to have a natural person as incorporator, and certainly no rationale to require more than one. The Model Act's historical justification for requiring multiple incorporators (the 1950 Model Act required three) appears to have been a somewhat irrational prejudice against "one-person" corporations. *See* Garrett, *supra* note 3, at 3 (requirement of multiple incorporators is firmly established in most states although regarded as fictional in many cases).

Curiously, the RMA is ambiguous in one respect: it sets no minimum age for an individual to be either an incorporator or a director. REVISED MODEL BUSINESS CORP. ACT §§ 2.01, 8.03 (1984). While the RMA permits corporations to prescribe qualifications for members of the board, it is unclear whether this contemplates a minimum age limitation. *See id.* § 8.02 & official comment. Under present Mississippi law, incorporators must be 21 and directors 18. MISS. CODE ANN. §§ 79-3-67, -103 (1972 and Supp. 1985). *Quaere* whether the common law age of capacity, 21, would impliedly prohibit a younger person from serving in these capacities.

[24] REVISED MODEL BUSINESS CORP. ACT § 1.20(i)(1984). A duplicate original can, of course, suffice as a conformed copy. *Id.* official comment.

[25] *Id.* § 1.20(g). The RMA makes verification or acknowledgement optional for all documents filed pursuant thereto. *Id.*

[26] The articles need state only the corporate name, number (but not par value) of authorized shares, street address of the initial registered office and initial registered agent, and name and address of each incorporator. *Id.* § 2.02(a). All other information and provisions are optional. Of course, certain provisions must appear in the articles if they are to apply. Provisions which are mandatory are those regarding a limited purpose; managing the business and affairs of the corporation; defining, limiting, and regulating the powers of the corporation, board, or shareholders; par value of shares; and imposition of personal liability on shareholders. *Id.* § 2.02(b)(2)(i)-(u).

[27] *Id.* § 3.02. Like the MBCA, the RMA contains an extensive grant of general powers; these need not be repeated in the articles. *Id.* § 2.02(c); *see* MISS. CODE ANN. § 79-3-7 (1972). The broad powers of § 3.02, coupled with the adoption of an "any lawful business" purpose provision, should virtually eliminate the possibility of an ultra vires attack on a transaction, unless of course the corporation has elected to limit its purpose. REVISED MODEL BUSINESS CORP. ACT § 3.02 official comment (1984); *see infra* note 28 (general powers of corporation). Nonetheless, the RMA retains a provision defining the scope of the ultra vires doctrine. REVISED MODEL BUSINESS CORP. ACT § 3.04 (1984). The Mississippi provision is substantially the same. MISS. CODE ANN. § 79-3-11 (1972).

It should be noted that the adoption of the RMA in this regard would require constitutional amendment, since "private corporation[s] for pecuniary gain" are constitutionally limited in Mississippi to a duration of 99 years. MISS. CONST. art. 7, § 178.

tion of "any lawful business" is desired.[28] The Secretary of State's duty of filing is ministerial in nature; no longer is he required to determine if the articles conform to law.[29] In addition, the Secretary is not required to issue a certificate of incorporation, but rather only to return the document copy to the corporation.[30] The articles are effective and the corporate existence begins upon filing, unless a delayed effective time and date are

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[28] REVISED MODEL BUSINESS CORP. ACT § 3.01(a) (1984). The RMA deems a corporation to be organized for any lawful purpose unless a more restricted purpose is stated in the articles. *Id.* § 2.02(b)(1).

While restrictive purpose clauses may sometimes be used to protect the interests of minority shareholders, the mandate for the specific purpose clause under the MBCA may serve no rational function, other than to test the ingenuity of drafters to phrase the purpose for which the corporation is organized in sufficiently broad terms to permit the transaction of any lawful business. *See* MISS. CODE ANN. § 79-3-105(c) (1972)(specific purpose or purposes for which corporation is organized shall be set forth, stated in general terms). Any supposed informational function to shareholders is negated by the fact that few, if any, shareholders of any corporation, whatever its size, ever examine its articles. Moreover, elimination of any requirement of specificity removes the possibility of a drafter unwittingly creating a potential ultra vires challenge.

Currently at least 34 states permit the use of "any lawful purpose" or similar clauses. ALA. CODE § 10-2A-91 (1980); ARIZ. REV. STAT. ANN. § 10-054 (1977); CAL. CORP. CODE § 202 (West 1977); COLO. REV. STAT. § 7-2-102 (Supp. 1985); CONN. GEN. STAT. ANN., §§ 33-290 (West Supp. 1986); DEL. CODE ANN. tit. 8, § 102 (1983); FLA. STAT. ANN. § 607.164 (West 1977); HAWAII REV. STAT. § 416-11 (Supp. 1984); IDAHO CODE § 30-1-54 (1980); ILL. ANN. STAT. ch. 32, ¶ 2.10 (Smith-Hurd 1985); IND. CODE ANN. § 23-1-22-1(a) (Burns Supp. 1986); IOWA CODE ANN. § 496A.49 (West Supp. 1986); KAN. STAT ANN. § 17-6002 (1981); KY. REV. STAT. ANN. § 271A.270 (Baldwin 1983); LA. REV. STAT. ANN. § 12.24 (West 1969); MICH. COMP. LAWS ANN. § 450.1202 (West 1973); MONT. CODE ANN. § 35-1-202 (1985); NEB. REV. STAT. § 21-2052 (1983); NEV. REV. STAT. § 78.035 (1985); N.H. REV. STAT. ANN. § 293-A:54 (Supp. 1985); N.J. STAT. ANN. §§ 14A:2-7, 14A:3-1(2) (West 1969); N.M. STAT. ANN. § 53-12-2 (1983); N.Y. BUS. CORP. LAW § 402 (McKinney 1986); N.C. GEN. STAT. § 55-7 (1982); OHIO REV. CODE ANN. § 1701.04 (Page 1985); OR. REV. STAT. § 57-311 (1984); PA. STAT. ANN. tit. 15, §§ 1204, 1302 (Purdon 1967); R.I. GEN. LAWS § 7-1.1-48 (1985); TEX. BUS. CORP. ACT ANN. art. 3.02 (Vernon 1980); VA. CODE § 13.1-626 (Repl. Vol. 1985); WASH. REV. CODE ANN. § 23A:12.020 (Supp. 1986); WISC. STAT. ANN. § 180.45 (West 1957); WYO. STAT. § 17-1-202 (1977). The new Tennessee Business Corporation Act, effective October 1, 1987, enacts the RMA provision. 1986 Tenn. Pub. Acts 887, § 3.01.

[29] REVISED MODEL BUSINESS CORP. ACT § 1.25(d) & official comment 1 (1984); *see infra* notes 33-49 and accompanying text.

[30] The need for formal certificates of corporate acts is unclear, and the RMA wisely eliminates the requirement that the Secretary issue certificates of incorporation, merger, or similar documents. REVISED MODEL BUSINESS CORP. ACT. § 1.25(b) & official comment 3 (1984).

specified in the articles.[31] The RMA does not require either publication of notice or recording in any public office other than that of the Secretary of State. The provisions of the RMA and MBCA dealing with the organizational meeting and adoption of bylaws are substantively similar.[32]

B. Secretary of State

In addition to miscellaneous simplifying provisions,[33] a second major contribution of the RMA is the clarification of the role of the Secretary of State. Early corporate statutes commonly provided for substantive review of articles of incorporation by a state official.[34] As previously noted, the MBCA charges the Secretary of State with the responsibility of determining that articles of incorporation "conform to law" before issuance

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[31] *Id.* §§ 1.23, 2.03(a). The RMA requires the Secretary to maintain a date and time stamp that will eliminate any ambiguities as to effective time. *Id.* § 1.23(a) & official comment. Filing is made conclusive proof that all conditions precedent to incorporation have been met, except in proceedings brought by the state. *Id.* § 2.03(b). As to the effect of the RMA on the issue of preincorporation transactions, see *infra* notes 53-66 and accompanying text.

[32] *Compare* REVISED MODEL BUSINESS CORP. ACT §§ 2.05-2.06 (1984)(where initial directors are named they shall hold organizational meeting of majority of directors; incorporators on board of directors shall adopt initial bylaws) *with* MISS. CODE ANN. §§ 79-3-51, -113 (1972)(bylaws adopted by board which also has power to amend or repeal unless power is reserved to shareholders; organizational meeting shall be called by majority of incorporators and three days notice thereof shall be given by mail). In addition, the RMA includes a provision dealing with emergency bylaws which does not appear in the MBCA but which has been adopted in a number of states. REVISED MODEL BUSINESS CORP. ACT § 2.07 (1984).

[33] *E.g.*, the RMA allows a document containing an "incorrect statement" or one defectively executed to be corrected by filing "articles of correction," thus eliminating the necessity of either refiling or submitting formal articles of amendment to correct minor errors. REVISED MODEL BUSINESS CORP. ACT § 1.24(a) (1984). The correction relates back to the date of the original filing except as to persons who detrimentally rely upon the original document before correction. *Id.* § 1.24(c). In addition, the RMA permits a corporation to change its registered office or agent simply by filing a statement of change without any shareholder or formal board action. *Id.* § 5.02. Under the MBCA, this seemingly mechanical act can be accomplished only by formal resolution of the board and subsequent filing with the Secretary of State. MISS. CODE ANN. § 79-3-23 (1972). There appears to be no reason for formal documentation of board approval for this to be effected.

[34] *See, e.g.*, Roberds, *supra* note 12, at 179-80 (noting authority of governor to regulate amount of paid-in capital before approving charter under 1928 Mississippi Corporation Act).

of the charter.[35] The scope of the Secretary of State's duties under such provisions is somewhat unclear: is he merely to review the charter for technical compliance with the minimum standards of the Act, or is he also charged with determining the substantive legality or relevance of provisions which may go beyond the bare statutory requirements? If the latter is the statute's meaning, one may then question whether the Secretary of State's office is adequately staffed to render a competent judgment on such matters, as well as the appropriateness of granting the Secretary broad substantive discretion in such areas. Existing case law on these issues, unsurprisingly, has yielded sometimes contradictory results.[36]

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[35] MISS. CODE ANN. § 79-3-107 (Supp. 1986). Similar language is employed regarding articles of amendment, restated articles of incorporation, amendment of articles of incorporation in reorganization, statements of reduction in capital, articles of merger or consolidation, articles of merger of a 95% subsidiary, articles of dissolution by act of the incorporators, shareholders or corporation, revocation of dissolution proceedings, application for certificate of authority of a foreign corporation, application for withdrawal of a foreign corporation, and annual reports. *Id.* §§ 79-3-121, -127, -129, -137, -147, -149, -163, -165, -169, -179, -185, -221, -234, -251 (1972 and Supp. 1986).

Currently at least 21 states have adopted comprehensive provisions dealing with the Secretary of State's duty in filing documents. ALA. CODE § 10-2A-93 (1980); ARK. STAT. ANN. § 64-117 (1980); CAL. CORP. CODE § 110 (West 1977); CONN. GEN. STAT. ANN. § 33-285 (West 1960); DEL. CODE ANN. tit. 8, § 103 (1983); GA. CODE ANN. § 14-2-5 (1982); IOWA CODE ANN. § 496A.53 (West 1962); KAN. STAT. ANN. § 17-6003 (1981); MD. CORPS. & ASS'NS CODE ANN. §§ 1-201, -202, -204 (1985); MASS. GEN. LAWS ANN. ch 156B, § 6 (West 1970); MICH. COMP. LAWS ANN. § 450.1131 (West 1973); MINN. STAT. ANN. § 302A.011(11) (West 1985); N.Y. BUS. CORP. LAW § 104 (McKinney 1986); N.C. GEN. STAT. § 54-4 (1982); OHIO REV. CODE ANN. § 1701.08 (Page 1985); PA. STAT. ANN. tit. 15, § 1010 (Purden 1967); S.C. CODE ANN. § 33-1-60 (Law. Co-op 1977); 1986 TENN. PUB. ACTS 887, § 1.35 (effective Oct. 1, 1987); WASH. REV. CODE ANN. § 23A.04.010(9)(17)(Supp. 1986); WIS. STAT. ANN. § 180.86 (West 1957). The standards expressed defining the scope of the secretary's discretion varies somewhat from state to state; in some, no standard whatsoever is defined.

[36] *E.g., compare* State *ex rel.* Grant v. Brown, 39 Ohio St. 2d 112, 313 N.E.2d 847, 848 (1974)(upholding authority of secretary to refuse articles of incorporation of nonprofit corporation whose purpose was the promotion of homosexuality on grounds that this was unlawful and contravened public policy) *with* Gay Activitists Alliance v. Lomenzo, 31 N.Y.2d 965, 293 N.E.2d 255, 256 (1973)(secretary wrongfully refused articles of incorporation of nonprofit corporation with purpose of seeking repeal of laws discriminating against homosexuals; secretary lacked authority to determine that certain purposes violate public policy or that proposed names are inappropriate).

For other examples, see Smith v. Director, Corporate & Sec. Bureau, 79 Mich. App. 107, 261 N.W.2d 228, 230-31 (1977)(state official had authority to reject article stating purpose of lending money at interest rates in excess of seven percent, then maximum rate permitted under Michigan's usury law); Coal Harbor Stock Farm, Inc. v. Meier, 191

The RMA provides that the Secretary has an express duty to file all documents which satisfy the requirements of the Act,[37] and that this duty is "ministerial."[38] By so doing, the RMA limits the Secretary's discretion to matters of technical compliance. Thus, he would have no authority to reject a document because he believes that it contains provisions that are irrelevant or that violate legal principles not contained in the Act.[39] The RMA properly recognizes that the Secretary's office is not the appropriate forum for such challenges to corporate documents.

Another area in which the proper role of the Secretary has engendered controversy is that of corporate names. As is true of the vast majority of state statutes,[40] the MBCA requires that a corporation's name include words denoting corporateness, *i.e.*, corporation, company, incorporated, or limited, or an abbreviation thereof.[41] The RMA maintains this requirement.[42] By far the most common problem in the area of corporate names, however, is that of similarity to that of an existing corporation currently registered in the state. The MBCA provides that a corporate name must not be "the same as, or deceptively similar to," that of an existing domestic corporation or a previously qualified

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N.W.2d 583, 588 (N.D. 1971)(articles of corporation with purpose of farming properly rejected where statutes prohibited all but qualified cooperative corporations from engaging in farming and limited power to own rural real estate); LeForce v. Bullard, 454 P.2d 297, 304 (Okla. 1969)(secretary wrongfully refused to file articles of farming corporation on ground that state constitution and statutes prohibited a corporation from farming since they prohibited corporate ownership of land; corporation can be formed in Oklahoma for general purpose of engaging in farming with power of owning real estate); State *ex rel.* Church v. Brown, 165 Ohio St. 31, 133 N.E.2d 333, 335-36 (1956)(secretary properly rejected articles of corporation whose purpose was to provide private facilities for the practice of nudism; formation of corporation would violate indecent exposure statute).

[37] REVISED MODEL BUSINESS CORP. ACT § 1.25(a) (1984). In order to be eligible for filing, all documents must contain the information required by the RMA and conform to technical requirements of form and execution. *Id.* § 1.20.

[38] *Id.* § 1.25(d).

[39] *Id.* § 1.25 official comment 1.

[40] Only Maine, Massachusetts, Utah, and Wyoming have no such general requirement. ME. REV. STAT. ANN. tit. 13A, § 301 (1981); MASS. GEN LAWS ANN. ch. 156B, § 11 (West 1970); UTAH CODE ANN. § 16-10-7 (1973); WYO. STAT. § 17-1-107 (1977).

[41] MISS. CODE ANN. § 79-3-13(a)(1972).

[42] REVISED MODEL BUSINESS CORP. ACT § 4.01(a).

foreign corporation.[43] The use of a "deceptive similarity" standard, however, may suggest an inappropriate overlap with the law of unfair competition. Under both the federal and Mississippi trademark statutes, the general test for registrability of a trademark is that it not "be likely . . . to cause confusion, or to cause mistake, or to deceive."[44] Inherent in the "likelihood of confusion" test applied under trademark law, however, is not only similarity in name but also the competitive nature of the businesses pursued by competing claimants.[45]

In some instances courts have held that unfair competition standards govern the results under corporate name statutes as well.[46] The resources of the Secretary of State may, however, be inadequate to make such a judgment, and the possibility of inconsistency is evident.[47] The RMA adopts the test "distinguishable upon the records of the Secretary of State" for determining the right to use a corporate name. This formulation makes it clear that similarity in an absolute or linguistic sense, and not confusion, is the appropriate test since the function of requiring

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[43] MISS. CODE ANN. § 79-3-13(c)(1972).

[44] 15 U.S.C. § 1052(d)(1980); MISS. CODE ANN. § 75-25-3(f)(1972). Unlike many states, Mississippi has no statute dealing with the registration of trade or assumed names. *See, e.g.*, CAL. BUS. & PROF. CODE §§ 14411-417 (West Supp. 1986)(filing of fictitious name raises rebuttable presumption of exclusive right to use as trade name); CONN. GEN. STAT. ANN. § 35-1 (West Supp. 1986)(assumed name under which business is to be conducted must be filed); MICH. COMP. LAWS ANN. §§ 445.1-445.5 (West Supp. 1986)(same); N.Y. GEN. BUS. LAW § 130 (McKinney Supp. 1986)(same); VA. CODE ANN. §§ 59.1-69 to 59.1-76 (1982 & Supp. 1986)(same).

[45] *See, e.g.*, Kentucky Fried Chicken v. Diversified Packaging, 549 F.2d 368, 388 (5th Cir. 1977)(confusion with respect to product's source, its indorsement by plaintiff, or its connection with plaintiff).

[46] *See, e.g.*, Couhig's Restaway Co. v. Pestaway, Inc., 278 So. 2d 519, 521 (La. App. 1973)(substantially same test as applied in determining infringement of proprietary right to trade name).

[47] An interesting case illustrating this point is Ergon, Inc. v. Dean, 649 S.W.2d 772 (Tex. Ct. App. 1983). Ergon, Inc., a Mississippi corporation, qualified to do business in Texas in 1973. *Id.* at 774. In 1978, the Secretary of State of Texas issued a charter to Nova Energy Corporation, which shortly thereafter changed its name to Ergon Energy Corporation. *Id.* Both Ergon and Ergon Energy were engaged in similar businesses. *Id.* at 775. Ergon sought to compel the Secretary to revoke approval of Ergon Energy's corporate name and also relief under the Federal Trademark Act. *Id.* at 773. The court, relying heavily upon regulations promulgated by the Secretary, upheld his decision to allow Ergon Energy to use its corporate name, but further held that Ergon Energy had infringed upon Ergon's federal trademark. *Id.* at 776-80.

distinguishable names in a corporate statute is to prevent confusion by the Secretary and taxing authorities, and to permit accurate service of process.[48] Under the RMA, no issues of the appropriate relationship between corporate law and unfair competition standards should arise.[49]

The RMA contains a number of clarifying features not present in earlier versions of the Model Act. One is an extensive set of definitions.[50] Perhaps even more helpful is a prescribed procedure for giving notice and rules defining when notice becomes effective.[51] The RMA also relieves the Secretary of State of an unnecessary responsibility by providing that in the event that service of process cannot be made on a corporation's registered agent, the corporation can be served by registered or certified mail addressed to the secretary of the corporation at its principal office shown in its most recent annual report.[52]

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[48] REVISED MODEL BUSINESS CORP. ACT. § 4.01 & official comment 2 (1984).

[49] The RMA carries forward other provisions from the 1969 Model Act relating to corporate names which would be desirable additions to Mississippi law. The first is a consent procedure to permit the use of similar names. The 1969 Model Act allowed a corporation to use a name that would be otherwise unavailable if it could obtain the written consent of the holder of the conflicting name and, if necessary, add one or more words to the new name to make it distinguishable. MODEL BUSINESS CORPORATION ACT § 8(c)(1969). A majority of states have adopted this or similar provisions. 1 REVISED MODEL BUSINESS CORP. ACT ANN. 252 (1985). While the Secretary of State of Mississippi has followed this practice on an informal basis, a codified procedure is preferable. The substance of the 1969 amendment is incorporated in REVISED MODEL BUSINESS CORP. ACT § 4.01(c)(1)(1984). In addition, the RMA authorizes the use of an indistinguishable name if the applicant can produce a judgment of a court of final jurisdiction establishing its right to the name. *Id.* § 4.01(c)(2).

The provisions of the MBCA and RMA dealing with reserved and registered names are substantially the same; the primary difference is that the RMA makes the reservation of a corporate name nonrenewable. *Compare* MISS. CODE ANN. §§ 79-3-15, -17 (1972 & Supp. 1985)(name reserved for period of 180 days) *with* REVISED MODEL BUSINESS CORP. ACT §§ 4.02, 4.03 (1984)(only single, one time reservation of 120 days is provided). Nothing in the RMA, however, prohibits an applicant from reapplying for reservation upon lapse, nor from forming an inactive corporation to maintain perpetual rights to a name. REVISED MODEL BUSINESS CORP. ACT § 4.02 official comment (1984).

[50] *See* REVISED MODEL BUSINESS CORP. ACT § 1.40 (1984)(definitions of terms used throughout Model Act collected in single section).

[51] *Id.* § 1.41. Notice provisions included in a corporation's articles or bylaws are effective to the extent that they are not inconsistent with the Act. *Id.* § 1.41(g).

[52] *Id.* § 5.04(b) & official comment. Under the MBCA the Secretary of State is deemed to be a corporation's agent when a registered agent is not appointed or cannot be found. MISS. CODE ANN. § 79-3-25 (1972). Service must therefore be made on the Secre-

C. *Liability for Preincorporation Obligations*

One of the most troublesome interpretative questions arising under earlier versions of the Model Act was its impact on the problems falling within the general rubric of defective incorporation. The classic case involved liabilities incurred before all formal conditions precedent to incorporation were met. The common law addressed the question of the potential liability of individuals acting on the corporation's behalf by the doctrines of de jure corporation, de facto corporation, or corporation by estoppel. So long as substantial compliance with the necessary steps to incorporation was effected, a de jure corporation would exist which was generally immune from either direct or collateral attack by the state or any other party.[53] Conversely, although the substantial compliance standard was not met, courts would recognize a de facto corporation where (1) there was a statute under which the corporation might have been validly organized, (2) a colorable attempt was made to comply with the statute, and (3) there was some exercise of corporate powers. A de facto corporation was safe from collateral challenge but could be attacked directly by the state in a *quo warranto* or similar

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tary, who forwards it to the corporation at its registered office. *Id.* No reason for the Secretary's intervention appears to exist.

A related technical problem exists concerning the resignation of a registered agent. Under the MBCA a resigning agent is to notify the Secretary, who then sends a copy of the notice to the corporation "at its registered office." MISS. CODE ANN. § 79-3-23 (1972). In many instances, however, that will be the address of the resigning agent, with the anomalous result that the resigning agent receives the notice of its resignation. Thus, the RMA provides for the Secretary to forward the notice to the corporation's registered office, if not discontinued, and to its principal office as shown on its annual report. REVISED MODEL BUSINESS CORP. ACT § 5.03(b)(1984).

[53] 8 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 3799 (rev. perm. ed. 1982) [hereinafter cited as W. FLETCHER]; A. HENN & J. ALEXANDER, LAWS OF CORPORATIONS § 139, at 327-28 (3d ed. 1983) [hereinafter cited as HENN & ALEXANDER]. Of course, this begs the question somewhat as to what constitutes "substantial compliance." One standard sometimes articulated is that the noncompliance be "slight." A. FREY, J. CHOPER, N. LEECH & C. MORRIS, CASES AND MATERIALS ON CORPORATIONS 34 (2d ed. 1977). A distinction is sometimes drawn between "directory" and "mandatory" provisions, a directory provision being an inconsequential one, noncompliance with which does not prejudice any public interest. W. FLETCHER, *supra*, § 3800; HENN & ALEXANDER, *supra*, at 328. An example would be the incorrect street address of an incorporator. For examples of other directory provisions see 1A W. FLETCHER, *supra*, § 132.

action.[54] Finally, regardless of the degree of compliance with incorporation procedures, one dealing with a purported corporation could, under the principle of corporation by estoppel, be precluded from denying its existence.[55]

The former Model Act contained two provisions relating to these issues. Section 56 provided:

> Upon the issuance of the certificate of incorporation, the corporate existence shall begin, and such certificate of incorporation shall be conclusive evidence that all conditions precedent required to be performed by the incorporators have been complied with and that the corporation has been incorporated under this Act, except as against this State in a proceeding to cancel or revoke the certificate of incorporation or for involuntary dissolution of the corporation.[56]

Section 146 of the Model Act provided that "[a]ll persons who assume to act as a corporation without authority so to do shall be jointly and severally liable for all debts and liabilities incurred or arising as a result thereof."[57]

The drafters of the Model Act took the position that these sections abrogated the de facto corporation concept and that nothing less than full compliance with the statute could create a corporation.[58] Given the simplicity of the incorporation proce-

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[54] 8 W. FLETCHER, *supra* note 53, § 3761; HENN & ALEXANDER, *supra* note 53, § 140, at 329-330. The doctrine of de facto corporation has also been applied where a condition precedent to doing business, as opposed to incorporation, has not been met. *See, e.g.*, In re Estate of Hardin, 218 So. 2d 889, 891 (Miss. 1969)(failure to comply with minimum paid-in capital did not deprive corporation of de facto status).

[55] W. FLETCHER, *supra* note 53, §§ 3889, 3910; HENN & ALEXANDER, *supra* note 53, § 141, at 335. In addition, those acting as a corporation may be estopped from denying the corporation's existence. W. FLETCHER, *supra* note 53, § 3930; HENN & ALEXANDER, *supra* note 53, § 141; *see, e.g.*, Taylor v. Aldridge, 180 Miss. 635, 643, 178 So. 331, 332-33 (1938)(Tennessee corporation doing business in Mississippi without qualifying as foreign corporation estopped from denying its existence).

[56] MODEL BUSINESS CORP. ACT § 56 (1969). Mississippi adopted this provision with the substitution of the word "chapter" for "Act." MISS. CODE ANN. § 79-3-109 (1972).

[57] MODEL BUSINESS CORP. ACT § 146 (1969). Mississippi adopted this provision without change. MISS. CODE ANN. § 79-3-285 (1972).

[58] The comment to § 56 stated that "a de facto corporation cannot exist under the Model Act." MODEL BUSINESS CORP. ACT § 56 comment (1969). Moreover, the drafters stated that the purpose of § 146 was "to prohibit the application of any theory of de facto corporation." *Id.* § 146 comment. Other authorities have commonly agreed. *See,*

dure under the Model Act, the logic of this argument seems sound. Nonetheless, not all courts have accepted the dictum of the drafters, the Supreme Court of Mississippi being an example.[59]

By far the more troublesome question is whether the doctrine of corporation by estoppel was affected by the Model Act and similar state statutes. Since the doctrine is equitable in nature and is based on a course of conduct rather than any question of statutory compliance, a convincing argument could be made that it was not abrogated by the Model Act. Two well-known cases, decided in the same year, reached opposite conclusions on the issue. In *Robertson v. Levy*,[60] the Court of Appeals for the District of Columbia held that the Model Act abrogated both the doctrines of de facto corporation and corporation by estoppel. Noteworthy in that case, however, was that the person acting on behalf of the purported corporation was aware that the charter had not been issued at the time that the obligation was incurred. Conversely, in *Cranson v. International Business Machines Corp.*,[61] the Supreme Court of Maryland applied the doctrine of corporation by estoppel despite the presence of a statute substantively identical to Section 56 of the Model Act. In that case, however, the individual defendant was unaware of the nonexistence of the corporation, the party at fault being his lawyer who had failed for seven months to file the articles. Subsequent cases have split on the issue,[62] although some states have ex-

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e.g., 8 W. FLETCHER, *supra* note 53, § 3762.1.

[59] *See* In re Estate of Hardin, 218 So. 2d 889, 891 (Miss. 1969)(failure to comply with minimum paid-in capital did not deprive corporation of de facto status); Gulf Land & Dev. Co. v. McRaney, 197 So. 2d 212, 217 (Miss. 1967)(de facto corporation exists where good faith attempt made under existing laws to organize corporation for specific purpose and corporation has exercised corporate functions for indefinite time).

[60] 197 A.2d 443 (D.C.C. App. 1964), *noted in* 43 N.C.L. REV. 206 (1964). *But see* Namerdy v. Generalcar, 217 A.2d 109, 112 (D.C. App. 1966)(corporation by estoppel applied).

[61] 234 Md. 477, 200 A.2d 33 (1964), *noted in* 10 VILL. L. REV. 166 (1964).

[62] *E.g.*, *compare* Thompson & Green Mach. v. Music City Lumber Co., 683 S.W.2d 340, 344 (Tenn. App. 1984)(both de facto corporation and corporation by estoppel eliminated in Tennessee) *with* Harris v. Stephens Wholesale Bldg. Supply Co., 54 Ala. App. 405, 309 So. 2d 115, 117-18 (1975) *and* Cantor v. Sunshine Greenery, Inc., 165 N.J. Super. 411, 398 A.2d 571, 573 (1979)(both applying corporation by estoppel).

pressly preserved the estoppel doctrine by statute.[63]

The RMA clarifies the intent of former section 146 by now providing that "[a]ll persons purporting to act as or on behalf of a corporation, *knowing there was no incorporation under this Act*, are jointly and severally liable for all liabilities created while so acting."[64] The drafters of the RMA concluded as a policy matter that in certain situations the recognition of limited liability would be appropriate notwithstanding the failure to comply with statutory formalities, with the overriding consideration being the good faith of the persons so acting.[65] The RMA, then, strikes an appropriate balance between the interests of participants in the corporate enterprise and third parties dealing with it, and is consistent with recent decisions of the Mississippi Supreme Court dealing with liability of persons who conduct business after the suspension of a corporation's charter.[66]

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[63] An earlier Minnesota statute preserved both de facto corporation and corporation by estoppel. MINN. STAT. ANN. § 301.08 (West 1980), *repealed by* 1981 MINN. LAWS 270, § 142. The comments to its present act take the position that the de facto corporation doctrine has been eliminated, but that the estoppel doctrine is unaffected. Reporter's Notes to MINN. STAT. ANN. § 302A.153 (West 1985). The Georgia Corporation Code provides that "[t]he existence of a corporation claiming a charter under color of law cannot be collaterally attacked by persons who have dealt with it as a corporation. Such persons are estopped from denying its corporate existence." GA. CODE ANN. § 14-5-4 (1982). In Cahoon v. Ward, 231 Ga. 872, 204 S.E.2d 622, 624-25 (1974), the Supreme Court of Georgia construed this as preserving the doctrine of corporation by estoppel which would otherwise have been eliminated by adoption of provisions identical to Model Act Sections 56 and 146. *But see* Don Swann Sales Corp. v. Echols, 160 Ga. App. 539, 287 S.E.2d 577, 580 (1981)(corporation by estoppel should not be applied to protect individual purporting to act for non-existent corporation from liability on contract executed in corporation's name).

[64] REVISED MODEL BUSINESS CORP. ACT § 2.04 (1984)(emphasis added).

[65] *Id.* official comment. As the comment notes, equivalent protection is accorded to limited partners who contribute capital in the erroneous belief that the certificate of limited partnership has been filed. *See, e.g.*, MISS. CODE ANN. § 79-13-23 (1972)(contributor to capital of business erroneously believing he has become limited partner is not bound by partnership provided he renounces his interest in profits of business).

Moreover, the comments state that, despite the lack of specific language to this effect, § 2.04 is not intended to foreclose the application of estoppel in instances where the defendants are urged to execute contracts in the corporate name by persons who are aware that no corporation exists. REVISED MODEL BUSINESS CORP. ACT § 2.04 official comment (1984).

[66] *Compare* Carolina Transformer Co. v. Anderson, 341 So. 2d 1327, 1329-30 (Miss. 1977)(owner and officer of corporation suspended for failure to file annual report liable under § 79-3-285 on contracts made in corporation's name after suspension) *with* Flana-

In summary, the provisions of Chapters 1 through 5 of the RMA provide a desirable basis for revision of the Mississippi Act. The RMA effectively accomplishes the dual goals of simplification and clarification of traditional laws dealing with the incorporation process.

II. Corporate Management and Governance

A. Composition and Structure of Board of Directors

The provisions of the RMA dealing with directors reflect not only widespread statutory developments but, in some instances, innovations not yet commonly found in state general corporation statutes. A striking example of the latter is the ability, under some circumstances, to eliminate the board of directors entirely or limit its authority by provisions in the articles describing who is to perform all or part of the board's duties. This election is limited to corporations with fifty or fewer shareholders.[67] While this is obviously practicable only for a close corporation, the RMA would permit such action even in a state like Mississippi with no separate close corporation statute.[68]

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gan v. Jackson Wholesale Bldg. Supply Co., 461 So. 2d 761, 764-65 (Miss. 1984)(wife of deceased owner of suspended corporation, though director, not liable since she was not actively involved in the control and management of corporation, notwithstanding that corporation and its finances were intertwined with her household).

[67] Revised Model Business Corp. Act § 8.01(c)(1984). Such provisions are not, of course, uncommon in states with separate close corporation statutes. *See, e.g.*, Del. Code Ann. tit. 8, § 351 (1983)(permitting management by shareholders). Related issues will be discussed in greater depth in Part 2 of this article.

A more radical approach is taken in Minnesota, where any business corporation can be managed by its shareholders. Minn. Stat. Ann. §§ 302A.201, 302A.457 (West 1985). The limitation in the RMA is consistent with the Close Corporation Supplement to the Model Act, which authorizes the elimination of the board in a statutory close corporation but would allow only existing corporations with 50 or fewer shareholders to amend its articles to elect close corporation status. Model Statutory Close Corp. Supplement §§ 3(b), 21 (1983). An unusual feature of the supplement is that it would permit a new corporation to elect such status without regard to the number of shareholders. *Id.* § 3(a).

[68] The avowed purpose of the drafters of the RMA is to avoid the necessity of manipulating a corporation's capital structure in order to achieve a similar result. The classic case is Lehrmann v. Cohen, 43 Del. Ch. 222, 222 A.2d 800 (1966), which upheld the issuance to the corporation's attorney of a class of voting common stock without a significant equity interest in order to create a tie-breaking vote on the board. The RMA would permit the same result by express provision in the articles, without the necessity of creating a special class of stock. Revised Model Business Corp. Act § 8.01 official

While relatively few corporations might avail themselves of this option, a provision of much wider appeal in the RMA is the elimination of the mandatory three member board. Surely no corporate practitioner in Mississippi has escaped the problems posed by the MBCA's insistence on three directors.[69] In many instances, particularly where the corporation has fewer than three shareholders, this requirement forces the inclusion on the board of persons with no equity interest and possibly no other financial interest in the corporation. Attorneys particularly are often put in the awkward position of declining a client's request to serve. The potential liability of the inactive director is clear,[70] but this is not always an easy matter to explain to clients. A figurehead director in general serves no purpose and the requirement of multiple directors appears purely historical in nature.[71] Thus, the RMA wisely mandates only one director unless the articles or bylaws provide to the contrary.[72]

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comment (1984); *cf. id.* § 7.31 (dealing with voting agreements among shareholders).

For a general discussion of the necessity *vel non* for a board of directors see Kessler, *Statutory Requirement of a Board of Directors: A Corporate Anachronism*, 27 U. CHI. L. REV. 696 (1960). Arguably, the mandate for cumulative voting in § 194 of the Mississippi Constitution could prevent outright abolition of the board. MISS. CONST. art. VII, § 194. Part 2 of this article will consider the desirability of separate close corporation treatment in Mississippi, as well as related issues involving shareholder control devices.

[69] MISS. CODE ANN. § 79-3-69 (1972).

[70] *See, e.g.*, Francis v. United Jersey Bank, 87 N.J. 15, 432 A.2d 814, 829 (1981)(estate of inactive director held liable to bankruptcy trustees of corporation for over $10,000,000 stolen from corporation by other directors). This is not to say, of course, that attorneys do not often play a useful role as directors of many companies. For a summary of arguments both supporting and criticizing this practice see Comment, *Corporate Counsel on the Board of Directors: An Overview*, 10 CUM. L. REV. 791 (1980).

[71] 2 MODEL BUSINESS CORP. ACT ANN. § 8.03, at 805 (1985).

[72] REVISED MODEL BUSINESS CORP. ACT § 8.03(a)(1984). The Model Act first eliminated the three-director requirement in 1969. MODEL BUSINESS CORP. ACT § 36 (1969). At least half the states now permit a one member board. 2 MODEL BUSINESS CORP. ACT ANN. § 8.03, at 808 (1985). For general background on the issue see Rudolph, *Further Thoughts on the One and Two Director Statutes*, 20 BUS. LAW. 781 (1965).

The RMA contains two other provisions concerning board size that would be beneficial additions to Mississippi's law. Under the MBCA, the number of directors is fixed in the bylaws, which may be amended by the board unless that power is reserved by the articles to the shareholders. MISS. CODE ANN. §§ 79-3-51, -69 (1972). In order to prevent the board from utilizing this power in a way which would fundamentally alter the board's composition, the RMA prohibits the board from increasing or decreasing the number of directors by more than 30% of the number of directors last approved by the shareholders. REVISED MODEL BUSINESS CORP. ACT § 8.03(b)(1984). In addition, the RMA

The RMA contains numerous other provisions which would effect other desirable changes in the MBCA. For example, the RMA specifically sanctions the common practice in many states of allocating among different classes of stock the right to elect all or a specified number of directors.[73] This is presently impermissible under the MBCA, which prohibits the issuance of common stock with no or limited voting rights, and mandates that all stock regardless of class (except preferred stock) have one vote per share on each matter submitted to shareholders.[74] This provision of the RMA might, however, run afoul of the constitutional mandate of cumulative voting in Mississippi.[75] For reasons which will be more fully explained later, this article recommends the elimination of mandatory cumulative voting,[76] which would make available this potentially valuable structural device.

Under the MBCA, the power to remove directors[77] and to fill vacancies[78] on the board is vested solely in the shareholders. The RMA would change this in two respects. First, the RMA provides a machinery for the judicial removal of a director. The standard for removal is that "(1) the director engaged in fraudulent or dishonest conduct, or gross abuse of authority or discretion, with respect to the corporation and (2) removal is in the best interest of the corporation."[79] The suit may be brought either by the corporation or by a shareholder suing derivatively on its behalf, or directly by the holders of ten percent or more of

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specifically sanctions the widely used device of providing for a variable size board in the bylaws. As a matter of shareholder protection, however, once shares are issued only the shareholders can change the range or change from a fixed to a variable size board, or vice versa. The specific number of directors within the range would then be determined by either the shareholders or directors as provided in the articles or bylaws. *Id.* § 8.03(c).

[73] REVISED MODEL BUSINESS CORP. ACT § 8.04 (1984). This, of course, is a commonly used control device in close corporations.

[74] *See* MISS. CODE ANN. §§ 79-3-27, -63 (1972). This is apparently an outmoded vestige of the common law's resistance to severing proprietary rights and control rights. *See* FREY, CHOPER, LEECH & MORRIS, *supra* note 53, at 541.

[75] MISS. CONST. art. 7, § 194; *see* HENN & ALEXANDER, *supra* note 53, § 189, at 499 n.33.

[76] *See infra* notes 258-68 and accompanying text.

[77] MISS. CODE ANN. § 79-3-75 (1972).

[78] *Id.* § 79-3-73.

[79] REVISED MODEL BUSINESS CORP. ACT § 8.09(a)(1984).

any class of stock.[80] The existence of this power could be significant, for example, in removing a director elected by cumulative voting. Under both the RMA[81] and the MBCA[82], such a director cannot be removed if votes sufficient for his election under cumulative voting are cast against his removal. While there is authority that a majority of shareholders have inherent power to remove a director for cause notwithstanding cumulative voting rights,[83] sufficient uncertainty exists on the issue to make an explicit judicial alternative desirable.[84]

The RMA also permits either the shareholders or directors to fill a vacancy on the board, unless otherwise provided in the articles.[85] In light of the logistical difficulties encountered by larger corporations in holding shareholders' meetings, this change in the MBCA[86] is recommended, particularly since the term of the new director is limited to the next shareholders' meeting at which directors are elected,[87] and in all events the power can be reserved to the shareholders exclusively if appropriate.[88]

The RMA also streamlines some functional aspects of board

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[80] Any such derivative action would be subject to the procedural restrictions of the RMA. *Id.* § 7.40.

[81] REVISED MODEL BUSINESS CORP. ACT § 8.08(c)(1984).

[82] MISS. CODE ANN. § 79-3-75 (1972). In all material respects, the RMA and MBCA are substantively identical on the issue of shareholder removal.

[83] *See* Campbell v. Loew's, Inc., 36 Del. Ch. 563, 134 A.2d 852, 857-58 (1957)(stockholders have power to remove director for cause). There is a division of authority on the question of a court's general equity power to remove a director. *E.g., compare* Brown v. North Ventura Road Dev. Co., 216 Cal. App. 2d 227, 233, 30 Cal. Rptr. 568, 571 (1963)(such power exists independent of statute) *with* Markovitz v. Markovitz, 336 Pa. 145, 8 A.2d 46, 48 (1939)(no such inherent powers).

[84] As the comments to the RMA point out, the procedure may also be practicably necessary in a public corporation due to the logistical difficulties in effecting a special shareholders' meeting. REVISED MODEL BUSINESS CORP. ACT § 8.09 official comment (1984). Moreover, even absent cumulative voting, super-majority provisions requiring a higher than majority vote for shareholder action may preclude removal for cause by less than the required percentage. HENN & ALEXANDER, *supra* note 53, § 205, at 559.

[85] REVISED MODEL BUSINESS CORP. ACT § 8.10(a). If the remaining directors constitute less than a quorum, a majority of those remaining have power to fill the vacancy.

[86] In Mississippi only shareholders can fill a vacancy. MISS. CODE ANN. § 79-3-73 (1972). Again, adoption of the RMA in this respect might necessitate constitutional amendment. *See* MISS. CONST. art. 7, § 194.

[87] REVISED MODEL BUSINESS CORP. ACT § 8.05(d)(1984).

[88] *E.g.*, in a closely-held corporation where shareholder action poses no real obstacle.

operation. For example, the RMA follows the widely-adopted trend of permitting the directors to meet by conference telephone call, with each participating director deemed to be present as if physically in attendance.[89] In addition, while the RMA, like the MBCA,[90] permits directors to act by unanimous written consent, the RMA specifically recognizes the common practice of using separate consent forms for all or some directors, and expressly provides that such action is effective upon the signature of the last director.[91]

The formalities of director action would also be affected by the RMA provisions on the quorum. The MBCA,[92] like the RMA, permits super-majority provisions in the articles or bylaws increasing the quorum up to and including unanimity.[93] Unlike the MBCA, however, the RMA would allow the articles or bylaws to *decrease* the quorum to not less than one-third of the directors.[94] While election of this option would be inappropriate in most closely-held corporations, the flexibility it would accord to public corporations has led to adoption of similar provisions in a substantial number of states.[95] This change is therefore recommended.

An interesting contrast in approach to board functioning appears in the RMA and MBCA provisions concerning committees. The MBCA requires that authorization for the creation of committees be made in the articles or bylaws; however, its restrictions on delegable powers are rather narrow in scope.[96] The

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[89] REVISED MODEL BUSINESS CORP. ACT § 8.20(b)(1984). The statute actually speaks in terms of "any means of communication by which all directors participating may simultaneously hear each other during the meeting," the wording of which would seem to embrace possible future advances in communications technology. Section 43 of the Model Act has permitted conference telephone meetings since 1973. *See, Report of Committee on Corporate Laws—Changes in the Model Business Corporation Act*, 29 BUS. LAW. 947, 948 (1974). Mississippi is one of but five states that has no comparable provision. 2 REVISED MODEL BUSINESS CORP. ACT ANN. § 8.20, at 876 (1985).

[90] MISS. CODE ANN. § 79-3-283 (1972).

[91] REVISED MODEL BUSINESS CORP. ACT § 8.21(a), (b)(1984).

[92] MISS. CODE ANN. § 79-3-77 (1972).

[93] REVISED MODEL BUSINESS CORP. ACT § 8.24(a) & official comment (1984).

[94] *Id.* § 8.24(b).

[95] *See* 2 REVISED MODEL BUSINESS CORP. ACT ANN. § 8.24, at 903 (1985)(overview of state laws dealing with quorum).

[96] Under the MBCA, committees cannot exercise the authority of the board in refer-

RMA, conversely, empowers the board to create such committees as it desires unless restricted by the articles or bylaws;[97] however, its list of non-delegable functions is considerably more detailed.[98] In view of the almost universal use of committees in public corporations, the RMA approach appears the more reasonable of the two.

B. Management Duties

1. Duty of Care.

Section 67 of the MBCA provides that "[T]he business and affairs of a corporation shall be managed by a board of directors."[99] Except in limited circumstances, however, the MBCA offers no statutory guidance as to the specific content of this duty, the standard of conduct to which directors are held, or potential

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ence to amending the articles of incorporation, adopting a plan of merger or consolidation, recommending to the shareholders the sale, lease, exchange, mortgage, pledge or other disposition of all or substantially all the property and assets of the corporation otherwise than in the usual and regular course of its business, recommending to the shareholders a voluntary dissolution of the corporation or a revocation thereof, or amending the bylaws of the corporation. MISS. CODE ANN. § 79-3-79 (1972).

[97] REVISED MODEL BUSINESS CORP. ACT § 8.25(a)(1984).

[98] *Id.* § 8.25(e), which provides:

> A committee may not, however:
> (1) authorize distributions;
> (2) approve or propose to shareholders action that this Act requires to be approved by shareholders;
> (3) fill vacancies on the board of directors or any of its committees;
> (4) amend articles of incorporation pursuant to section 10.02;
> (5) adopt, amend, or repeal bylaws;
> (6) approve a plan of merger not requiring shareholder approval;
> (7) authorize or approve reacquisition of shares, except according to a formula or method prescribed by the board of directors; or
> (8) authorize or approve the issuance or sale or contract for sale of shares, or determine the designation and relative rights, preferences, and limitations of a class or series of shares, except that the board of directors may authorize a committee (or a senior executive officer of the corporation) to do so within limits specifically prescribed by the board of directors.

Id. As with the MBCA, the RMA provides that delegation to a committee does not itself absolve the directors from their duties of management. *Compare* MISS. CODE ANN. § 79-3-79 (1972)(delegation "shall not operate to relieve the board . . . of any responsibility imposed by law") *with* REVISED MODEL BUSINESS CORP. ACT § 8.25(f)(1984)(creation, delegation to, or action by committee "does not alone constitute compliance by a director with the standards of conduct described in section 8.30").

[99] MISS. CODE ANN. § 79-3-67 (Supp. 1985).

liabilities for failure to meet any such standard as may be imposed.[100] In addition, few Mississippi cases exist on the issue of mismanagement absent self-dealing or a conflict of interest.[101] Thus there is but little authority concerning two distinct, but interrelated concepts: the duty of care and the business judgment rule.

In its simplest sense, the duty of care recognizes that as a corollary to their duties of management, directors may be liable to the corporation for negligence in the performance of those duties.[102] There exists, then, the possibility of liability for waste,

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[100] Specific statutory liability is imposed upon directors who vote for or assent to (1) payment of an improper dividend or distribution, (2) an improper repurchase of shares, (3) distribution of assets in liquidation without adequate provisions for corporate obligations, (4) a loan to an officer or director or a loan secured by the corporation's shares, or (5) the commencement of business before the minimum capital of $1,000.00 has been paid in for shares. MISS. CODE ANN. § 79-3-91 (1972). This provision is derived from § 48 of the Model Act. *See* MODEL BUSINESS CORP. ACT § 48 (1969)(providing framework for first three instances listed above).

[101] Two leading cases each involve an element of self-dealing. In Landstreet v. Meyer, 201 Miss. 826, 29 So. 2d 653 (1947), the court held that the minority shareholders of a corporation had a right to enjoin the payment of the president's salary upon a showing that it was clearly excessive and wasteful; however, the president had cast the deciding vote on his salary. *Id.* at 833, 29 So. 2d at 655. In a more recent case, Home Tel. Co. v. Darley, 355 F. Supp. 992 (N.D. Miss. 1973), *aff'd per curiam*, 489 F.2d 1403 (5th Cir. 1974), directors were held liable to the corporation for negligence in inducing the corporation to breach a merger agreement; however, in addition to the fact that this action had no corporate purpose, the court emphasized that the defendants personally benefitted from the breach. *Darley*, 355 F. Supp. at 998. The case is one of very few in Mississippi attempting to articulate the business judgment rule: "Although an officer is surely not liable for honest errors or mistakes in judgment when acting in good faith, this does not excuse mistakes where the loss is the result of failure to exercise ordinary care, skill and diligence." *Darley* 355 F. Supp. at 1000. While the court spoke in terms of negligence, however, there was a clear conflict of interest on the part of the defendants which should have rendered any consideration of the business judgment rule moot. *See infra* text accompanying note 112.

In addition, a number of Mississippi cases, while not explicitly premised on the business judgment rule, emphasize the tradition of judicial deference to the concept of majority rule in corporations. *See, e.g.*, Crocker v. Farmers & Merchants Bank, 293 So. 2d 438, 442 (Miss. 1974)(court should not enter area of corporate management except in cases where judicial action is essential to justice); Hudson v. Belzoni Equip. Co., 211 Miss. 178, 188, 51 So. 2d 223, 226 (1951)(courts are not to control corporations except in cases where such control is essential to justice).

[102] *See, e.g.*, HENN & ALEXANDER, *supra* note 53, § 234, at 621. For general background on the topic see 3A W. FLETCHER, *supra* note 53, § 1035; Dyson, *The Director's Liability for Negligence*, 40 IND. L.J. 341, 367-71 (1965); Lewis, *The Business Judgment Rule and Corporate Directors' Liability for Mismanagement*, 22 BAYLOR L. REV. 157,

mismanagement, or other acts resulting in loss to the corporation even absent self-dealing on the director's part.[103] Judicial formulations of the content of this duty abound. A common expression of the duty is that care which "ordinarily careful and prudent men would use in similar circumstances."[104] The Mississippi Supreme Court has described the standard as "that degree of care in managing [the corporation] that ordinarily prudent and diligent men would exercise under similar circumstances in the conduct and management of their own business."[105] The

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157-60 (1970).

[103] The reality of that threat has been the source of no little debate. In a well-known article, Professor Joseph W. Bishop, Jr. argued that virtually no cases existed which imposed liability for breach of the duty of care in non-financial corporations without some component of self-dealing. Bishop, *Sitting Ducks*, *supra* note 14, at 1099. That argument, however, has not gone unchallenged. *See, e.g.*, Harris, *Standards of Conduct Under Common Law, Present Day Statutes and the Model Act*, 27 BUS. LAW. 61, 66 (1972)(contending that reported cases do not reflect possibility that substantial numbers of such actions may have been settled out of court). Certainly, recent cases suggest that the duty of care has more than a mere exhortative function. *See, e.g.*, Smith v. Van Gorkom, 488 A.2d 858, 872-73 (Del. 1985)(director's duty to exercise informed business judgment is in nature of duty of care); Francis v. United Jersey Bank, 87 N.J. 15, 432 A.2d 814, 824 (1981)(director's duty of care does not exist in abstract).

[104] Graham v. Allis-Chalmers Mfg. Co., 41 Del. Ch. 78, 84, 188 A.2d 125, 130 (1963).

[105] Boyd v. Applewhite, 121 Miss. 879, 897, 84 So. 16, 23 (1920). It is noteworthy that *Boyd*, a case in which liability was imposed on directors for mismanagement, involved a banking corporation. It is commonly said that bank directors, due to their position of public trust, are held to higher standards of accountability than directors of other businesses. *See, e.g.*, Litwin v. Allen, 25 N.Y.S.2d 667, 678 (N.Y. Sup. Ct. 1940)(director of bank, entrusted with funds of depositors and protection of stockholders, is held to stricter accountability than diretor of ordinary business corporation); 3A W. FLETCHER, *supra* note 53, §§ 1035, 1042 (undoubtedly director of bank held to stricter accountability than director of ordinary business corporation); Bishop, *supra* note 14, at 1098 (bank director's mismanagement viewed as something worse than ordinary negligence). *But see* McDonnell v. American Leduc Petroleums, 491 F.2d 380, 383 (2d Cir. 1974)(asserting that standard of care for directors of financial institutions is same as for directors of other corporations).

There is some disagreement as to whether the use of the words " in the conduct and management *of their own business*" or similar language has been of significance in any reported case involving director liability. In any event, the clear consensus is that the difference in this and the Model Act standard has no practical importance. *See, e.g.*, Chittur, *The Corporate Director's Standard of Care: Past, Present, and Future*, 10 DEL. J. CORP. L. 505, 510 & nn.33-41 (1985)(citing Selheimer v. Manganese Corp., 224 A.2d 634 (1966), as representing rare, if not only case in which inclusion of phrase "in their personal business affairs" has been determinative of outcome); Veasey & Manning, *Codified Standard - Safe Harbor or Unchartered Reef? An Analysis of the Model Act Standard of Care Compared with Delaware Law*, 35 BUS. LAW. 919, 926-27 & n.36 (1979)(same).

level of performance required to discharge this duty is, however, unclear; authorities are divided as to whether ordinary negligence, or gross negligence, is the test of liability.[106]

In many instances, however, the question of the exact parameters of the duty of care is rendered moot because of the application of the business judgment rule: so long as a decision of the directors has a rational basis, and was made in good faith and for what they honestly believed to be in the best interest of the shareholders, it will not be reviewed by a court.[107] In its ordinary sense it serves as a defense for directors, who are thereby shielded from liability for honest mistakes of judgment.[108] The rule is traditionally justified on several bases: the recognition by courts of their inherent limitations in business matters and their concomitant reluctance to substitute their judgment for that of directors;[109] the realization that directors are fallible and that persons of ability would be reluctant to serve as directors if the law imposed an unreasonably demanding degree of foresight;[110]

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[106] *See, e.g.*, Veasey & Manning, *supra* note 105, at 926-930 (asserting that there is no agreement on level of care required, and discussion of that conflict); Veasey & Seitz, *The Business Judgment Rule in the Revised Model Act, the* Trans Union *Case, and the ALI Project—A Strange Porridge*, 63 TEX. L. REV. 1483, 1493 (1985) (commentators do not agree on level of care required—ordinary negligence or gross negligence) [hereinafter cited as Veasey & Seitz].

[107] 3A W. FLETCHER, *supra* note 53, § 1039; HENN & ALEXANDER, *supra* note 53, § 242, at 661. An excellent overview of this topic is found in Arsht, *The Business Judgment Rule Revisited*, 8 HOFSTRA L. REV. 93 (1979) [hereinafter cited as Arsht].

[108] Veasey & Seitz, *supra* note 106, at 1484-85.

A technical distinction is sometimes drawn by commentators between the business judgment *rule* and the business judgment *doctrine*. The business judgment rule is a defense invoked to shield directors from personal liability for damages. The same principle of deference to directors may also be applied in a case seeking to *enjoin* board action to uphold the decision itself. The latter is sometimes referred to as "transactional justification." Thus, the rule protects the decision maker, while the doctrine protects the decision. *See, e.g.*, Hinsey, *Business Judgment and the American Law Institute's Corporate Governance Project: The Rule, the Doctrine, and the Reality*, 52 GEO. WASH. L. REV. 609, 611-12, 618 (1984) [hereinafter cited as Hinsey]; Veasey & Seitz, *supra* note 106, at 1487-88. This terminology is not, however, commonly employed by courts, and this article will use the term "business judgment rule" as subsuming both aspects.

[109] *See, e.g.*, Auerbach v. Bennett, 47 N.Y. 619, 629, 393 N.E.2d 994, 1000, 419 N.Y.S.2d 920, 926 (1979)(doctrine bars judicial inquiry into actions of corporate directors in good faith and honest judgment in legitimate furtherance of corporate purposes); Hinsey, *supra* note 108, at 612 (same); Phillips, *Principles of Corporate Governance: A Critique of Part IV*, 52 GEO. WASH. L. REV. 653, 664 (1984).

[110] *See* Arsht, *supra* note 107, at 95-97. A related concern is that imposing liability

and the fact that many business decisions involve an inherent element of risk-taking.[111] The rule, however, is not unlimited. Directors may lose its benefit if they have a personal interest in the challenged transaction,[112] fail to exercise due care,[113] abuse their discretion,[114] or act in bad faith.[115] By the same token, in theory the business judgment rule need not be invoked at all unless a director cannot establish compliance with the standard of conduct prescribed by the duty of care.[116]

The Model Act first codified the duty of care of directors in 1974 by amending section 35; that amendment also incorporated

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on directors may in many instances visit them with a crushing financial burden completely out of proportion to any possible degree of culpability. *See* R. HAMILTON, CORPORATIONS 705 (2d ed. 1981)(discussing financial burden of directors in proportion to culpability).

[111] *See* Arsht, *supra* note 107, at 100.

[112] *Id.* at 115-18.

[113] *Id.* at 118-21; *see* Hinsey, *supra* note 108, at 615 (business judgment rule not applicable where director has made no actual decision). Thus it is commonly said that the business judgment rule has no application where directors have failed to act or to make an informed decision. *See, e.g.*, Aronson v. Lewis, 473 A.2d 805, 813 (Del. 1984)(business judgment rule has no relevance to corporate decisionmaking until after decision has been made); Casey v. Woodruff, 49 N.Y.S.2d 625, 643 (N.Y. Sup. Ct. 1944)(courts do not interfere with business judgment so long as reasonable diligence has been exercised); Arsht, *supra* note 107, at 119-20.

[114] Arsht, *supra* note 107, at 121-27.

[115] *Id.* at 127-30. *See generally* 3A W. FLECTHER, *supra* note 53, § 1040 (exemption of corporate officers from liability for mistakes and judgment errors only applies where there is exercise of skill, diligence, and care).

[116] *E.g.*, Section 8.30(d) of the RMA provides that " [a] director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section." The comments elaborate on this point:

> Thus, both former section 35 and current section 8.30(d) are self-executing, and the individual director's exoneration from liability is automatic. If compliance with the standard of conduct set forth in former section 35 or section 8.30 is established, there is no need to consider possible application of the business judgment rule. The possible application of the business judgment rule need only be considered if compliance with the standard of conduct set forth in former section 35 or section 8.30 is not established.

REVISED MODEL BUSINESS CORP. ACT. § 8.30(d) official comment, at 224 (1984).

The point to emphasize, then, is that the duty of care and business judgment rule are not the same. Courts often lack precision, however, in their discussions of these concepts and those of self-dealing. *See, e.g.*, Home Tel. Co. v. Darley, 355 F. Supp. 992, 1000 (N.D. Miss. 1973) (although officer not liable for honest errors or mistakes of judgment when acting in good faith, this does not excuse mistakes where loss is result of failure to exercise ordinary care, skill, and diligence), *aff'd per curiam*, 489 F.2d 1403 (5th Cir. 1974), discussed *supra* note 101.

a general statutory right of reliance on information furnished by specified sources.[117] That provision was adopted in substance (but with some reorganization) by Section 8.30 of the RMA, the full text of which is as follows:

> (a) A director shall discharge his duties as a director, including his duties as a member of a committee:
>
> (1) in good faith;
>
> (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
>
> (3) in a manner he reasonably believes to be in the best interests of the corporation.
>
> (b) In discharging his duties a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:
>
> (1) one or more officers or employees of the corporation whom the director reasonably believes to be reliable

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[117] *See Report of Committee on Corporate Laws: Changes in the Model Business Corporation Act*, 30 BUS. LAW. 501 (1975). The text of the relevant portion of section 35 is as follows:

> A director shall perform his duties as a director, including his duties as a member of any committee of the board upon which he may serve, in good faith, in a manner he reasonably believes to be in the best interests of the corporation, and with such care as an ordinarily prudent person in a like position would use under similar circumstances. In performing his duties, a director shall be entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, in each case prepared or presented by:
>
> (a) one or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented,
>
> (b) counsel, public accountants or other persons as to matters which the director reasonably believes to be within such person's professional or expert competence, or
>
> (c) a committee of the board upon which he does not serve, duly designated in accordance with a provision of the articles of incorporation or the bylaws, as to matters within its designated authority, which committee the director reasonably believes to merit confidence,
>
> but he shall not be considered to be acting in good faith if he has knowledge concerning the matter in question that would cause such reliance to be unwarranted.

MODEL BUSINESS CORP. ACT § 35 (1974). For a useful, practical interpretation of the meaning of section 35, see *Corporate Director's Guidebook*, 33 BUS. LAW. 1591, 1600 (1978).

and competent in the matters presented;
(2) legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the person's professional or expert competence; or
(3) a committee of the board of directors of which he is not a member if the director reasonably believes the committee merits confidence.

(c) A director is not acting in good faith if he has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted.

(d) A director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section.[118]

While at least thirty-two states have now codified the duty of care,[119] there is no direct analogue to Section 8.30 in the MBCA. Section 91 of the MBCA imposes a statutory liability on directors who vote for or assent to improper dividends, share repurchases, distributions in liquidation, loans to insiders, or the commencement of business before the receipt of the minimum

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[118] REVISED MODEL BUSINESS CORP. ACT § 8.30 (1984).

[119] ALA. CODE 10-2A-74 (1980); CAL. CORP. CODE § 309(a))(West 1977); COLO. REV. STAT. § 7-5-101(2)(Supp. 1985); CONN. GEN. STAT. ANN. § 33-313(d))(West Supp. 1986); FLA. STAT. ANN. § 607.111(4))(West 1977); GA. CODE ANN. §§ 14-2-152 (1982); HAWAII REV. STAT. § 416-91.5(c)(Supp. 1984); IDAHO CODE § 30-1-35 (1980); IND. CODE ANN. § 23-1-35-1 (Burns Supp. 1986); IOWA CODE ANN. § 496A.34 (West Supp. 1986); LA. REV. STAT. ANN. § 12.91 (West 1969); ME. REV. STAT ANN. tit. 13-A, § 716 (1981); MD. CORP. & ASS'NS CODE ANN. § 2.405.1(a)(3))(1985); MASS. ANN. LAWS ch. 156B, § 65 (West Supp. 1986); MICH. COMP LAWS ANN. § 450.1541(1))(1973); MINN. STAT. ANN. § 302A.251 (West 1985); MONT. CODE ANN. § 35-1-401(2))(1985); NEB. REV. STAT. § 21-2035 (1983); N.H. REV. STAT. ANN. § 293-A:35 (Supp. 1985); N.J. STAT./ ANN. § 14A:6-14 (West 1969); N.Y. BUS. CORP. LAW § 717 (McKinney 1986); N.C. GEN. STAT. § 55-35 (1982); OHIO REV. CODE ANN. § 1701.59 (Page 1985); OKLA. STAT. ANN. tit. 18, § 1.34 (West 1986); OR. REV. STAT. § 57.228 (1984); PA. STAT. ANN. tit. 15, § 1408 (Purdon 1967); R.I. GEN. LAWS § 7-1.1-33 (1985); S.C. CODE ANN. § 33-13-150 (Law. Co-op. 1977); TENN. CODE ANN. § 48-1-813 (1984); VA. CODE ANN. § 13.1-690 (Repl. Vol. 1985); WASH. REV. CODE ANN. § 23A.08.343 (Supp. 1986); WYO. STAT. § 17-1-133(b) (Supp. 1985). The new Tennessee Business Corporation Act, effective October 1, 1987, adopts section 8.30 of the RMA without change. 1986 Tenn. Pub. Acts ch. 887, §§ 8.30, 17.08.

capital.[120] Also, it includes a limited right of reliance for the purpose of determining liability under the section.[121] The MBCA does not otherwise speak to the issue of a standard of conduct for directors. The salient question, then, is whether it should.

Few, if any, issues in the field of corporate law have been subject to more extensive recent debate than the appropriate standard of conduct for directors. In addition to the development of the Model Act and RMA standards, the American Law Institute's Principles of Corporate Governance Project has dealt intensively with the issue,[122] as has an immense body of scholarly literature.[123] Any attempt at an in-depth analysis of the is-

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[120] MISS. CODE ANN. § 79-3-91 (1972).

[121] Specifically, a director may rely upon:

> [F]inancial statements of the corporation represented to him to be correct by the president or the officer of such corporation having charge of its books of account, or stated in a written report by an independent public or certified public accountant or firm of such accountants fairly to reflect the financial condition of such corporation . . . .

Id. He is likewise shielded from liability if "in good faith in determining the amount available for any such dividend or distribution he considered the assets to be of their book value." *Id.*

[122] PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS (Tent. Draft No. 4, 1985) [hereinafter cited as Tent. Draft No. 4].

[123] *See, e.g.*, Andrews, *Corporate Governance Eludes the Legal Mind*, 37 U. MIAMI L. REV. 213 (1983); Arsht, *supra* note 107; Arsht & Hinsey, *Codified Standard-Same Harbor but Charted Channel: A Response*, 35 BUS. LAW. 947 (1980); Brudney, *The Role of the Board of Directors: The ALI and Its Critics*, 37 U. MIAMI L. REV. 223 (1983); Christy, *Corporate Mismanagement as Malpractice: A Critical Reanalysis of Corporate Managers' Duties of Care and Loyalty*, 21 HOUS. L. REV. 105 (1984); Coffee, *Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance*, 84 COLUM. L. REV. 1145 (1984) [hereinafter cited as Coffee]; Cohn, *Demise of the Director's Duty of Care: Judicial Avoidance of Stands and Sanctions Through the Business Judgment Rule*, 62 TEX. L. REV. 591 (1983); Dent, *The Revolution in Corporate Governance, the Monitoring Board, and the Director's Duty of Care*, 61 B.U.L. REV. 623 (1981); Eisenberg, *The Modernization of Corporate Law: An Essay for Bill Cary*, 37 U. MIAMI L. REV. 187 (1983); Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259 (1982); Frankel, *Corporate Directors' Duty of Care: The American Law Institute's Project on Corporate Governance*, 52 GEO. WASH. L. REV. 705 (1984) [hereinafter cited as Frankel]; Goldstein, *Future Articulation of Corporate Law*, 39 BUS. LAW. 1541 (1984); Hinsey, *supra* note 108; Kennedy, *The Standard of Responsibility for Directors*, 52 GEO. WASH. L. REV. 624 (1984) [hereinafter cited as Kennedy]; Knauss, *Corporate Governance - A Moving Target*, 79 MICH. L. REV. 478 (1981); Letts, *Corporate Governance: A Different Slant*, 35 BUS. LAW. 1505 (1980); Mace, *Directors: Myth and Reality - Ten Years Later*, 32 RUTGERS L. REV. 293 (1979); Mangrum, *In Search of a Paradigm of Corporate Social Responsibility*, 17 CREIGHTON L. REV. 21

sue is beyond the scope of this article. Some general observations, however, should be made.

Foremost among these is that there is obviously no consensus whatsoever as to the appropriate standard of care, whether existing formulations are too lax or too demanding, or indeed whether it is feasible to codify the duty of care at all. Even the drafters of the RMA have been inconsistent in their approach; the original version of section 8.30 attempted not only to state the duty of care but also to codify the business judgment rule.[124]

(1983-84); Manning, *The Business Judgement Rule and the Director's Duty of Attention: Time for Reality*, 39 BUS. LAW. 1477 (1984); Manning, *The Business Judgment Rule in Overview*, 145 OHIO ST. L.J. 615 (1984); Phillips, *Principles of Corporate Governance: A Critique of Part IV*, 52 GEO. WASH. L. REV. 653 (1984); Ruder, *Protections for Corporate Shareholders: Are Major Revisions Needed?*, 37 U. MIAMI L. REV. 243 (1983); Scott, *Corporation Law and the American Law Institute Corporate Governance Project*, 35 STAN. L. REV. 927 (1983); Steinberg, *The American Law Institute's Draft Restatement on Corporate Governance: The Business Judgment Rule, Related Principles, and Some General Observations*, 37 U. MIAMI L. REV. 295 (1983); Veasey, *New Insights into Judicial Deference to Directors' Business Decisions: Should We Trust the Courts?*, 39 BUS. LAW. 1461 (1984); Veasey & Manning, *supra* note 105; Williamson, *Corporate Governance*, 93 YALE L.J. 105 (1984).

[124] 1983 REVISED MODEL BUSINESS CORP. ACT § 8.30 (Exposure Draft March, 1983). The 1983 Draft provides:

> (a) A director shall discharge his duties as a director, including his duties as a member of a committee:
>
> (1) in good faith;
>
> (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
>
> (3) When exercising his business judgment, with the belief, premised on a rational basis, that his decision is in the best interests of the corporation.
>
> (b) In discharging his duties a director is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, if prepared or presented by:
>
> (1) one or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;
>
> (2) legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the person's professional or expert competence; or
>
> (3) a committee of the board of which he is not a member, as to matters within its jurisdiction, if the director reasonably believes the committee merits confidence.
>
> (c) A director is not acting in good faith if he has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted.

This latter effort was abandoned in the final version of section 8.30.[125]

(d) Subject to compliance with section 8.31 if a director has an interest in a transaction:
  (1) the director is not liable for the performance of the duties of his office if he acted in compliance with this section; and
  (2) a person alleging a violation of this section has the burden of proving the violation.

(e) Subject to compliance with other provisions of this Act and other applicable law, a proceeding to enjoin, modify, rescind, or reverse a business decision, based on an alleged violation of this section, may not prevail if the directors who made the decision discharged their duties in compliance with this section.

Id.

[125] The explanation for the change is that extensive adverse comments were received to the proposed section; in light of these, the drafters concluded that the issues involved were too complex to resolve at that time and returned to the more traditional formulation finally adopted. *See* 2 MODEL BUSINESS CORP. ACT ANN. 933 (3d ed. 1985); Goldstein, *supra* note 8, at 1475.

This criticism has not deterred the American Law Institute; Section 4.01 of the proposed Principles of Corporate Governance embraces both concepts:

(a) A director or officer has a duty to his corporation to perform his functions in good faith, in a manner that he reasonably believes to be in the best interests of the corporation, and with the care that an ordinarily prudent person would reasonably be expected to exercise in a like position and under similar circumstances.
  (1) This duty includes the obligation to make, or cause to be made, such inquiry as the director or officer reasonably believes to be appropriate under the circumstances.
  (2) In performing any of his functions (including his oversight functions), a director or officer is entitled to rely on materials and persons in accordance with §§ 4.02-.03.

(b) Except as otherwise provided by statute or by a standard of the corporation and subject to the board's ultimate responsibility for oversight, in performing its functions (including oversight functions), the board may delegate, formally or informally by course of conduct, any function (including the function of identifying matters requiring the attention of the board) to committees of the board or to directors, officers, employees, experts, or other persons; a director may rely on such committees and persons in fulfilling his duty under this Section with respect to any delegated function if his reliance is in accordance with §§ 4.02-.03.

(c) A director or officer who makes a business judgment in good faith fulfills his duty under this Section if:
  (1) he is not interested in the subject of his business judgment;
  (2) he is informed with respect to the subject of his business judgment to the extent he reasonably believes to be appropriate under the circumstances; and
  (3) he rationally believes that his business judgment is in the best inter-

The Model Act (and RMA) standard has been criticized on various grounds. Some argue that the inclusion of the "reasonable belief" test may tend to undercut the good faith standard of the business judgment rule and expand the scope of judicial review of decisions which would otherwise not be subject to attack.[126] Others suggest that, due to its different variables, it is difficult to construct, apply, and understand.[127] Interestingly, in drafting the new Virginia Stock Corporation Act, the Virginia Code Commission concluded that RMA Section 8.30 could hold directors to an unrealistically high standard.[128] Virginia, however, apparently has adopted a standard that requires only good faith, thereby foreclosing any inquiry into a director's competence.[129] Certainly the high cost and, indeed, increasing unavailability of directors' and officers' insurance has created very legitimate concerns on the part of corporate management as to its potential liability. The Virginia Legislature was, no doubt, moti-

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ests of the corporation.

Tent. Draft No. 4, *supra* note 122, § 4.01. So long as a business decision is made on an informed basis, then, it is reviewed not against the "reasonable man" standard generally applicable but against the more lenient business judgment rule. Murphy, *The New Virginia Stock Corporation Act: A Primer*, 20 U. RICH. L. REV. 67, 106 n.111 (1985) [hereinafter cited as Murphy]. Extensive commentary on the ALI standard can be found in Frankel, *supra* note 123; Hinsey, *supra* note 108; Kennedy, *supra* note 123; Phillips, *supra* note 123.

[126] *See, e.g.*, Veasey & Manning, *supra* note 105, at 930-42.

[127] Murphy, *supra* note 125, at 105-06. The author suggests the following methodology for applying the Model Act test:

> Application of this standard requires the trier of fact first to construct a factual background including the time and information constraints, the makeup of the board, and its role in corporate decision making (the "in like position" and "in similar circumstances" elements). Next, what the ordinarily prudent person, as measured against that factual background, would do with respect to the issue in question must be determined. Finally, the trier of fact must decide if the conduct or action of the directors in question was consistent with the reasonable man standard.

Id. at 105.

[128] VA. CODE COMM'N, REPORT ON THE REVISION OF CHAPTERS 1 AND 2 OF TITLE 13.1 OF THE CODE OF VIRGINIA, H. DOC. NO. 13, app. 4, at 248 (1985).

[129] As enacted, the new Virginia statute requires a director to act "in accordance with his good faith business judgment of the best interests of the corporation." VA. CODE ANN. § 13.1-690(A)(repl. vol. 1985). By eliminating any semblance of a reasonable man standard, the Virginia Act may reduce the duty of care to a purely subjective inquiry into the director's good faith. In so doing the statute may invite protection for "the utterly inept, but well-meaning, good faith director." Murphy, *supra* note 125, at 108.

vated in part by those concerns in its actions. On the other hand, it is disingenuous to ignore the revenue-enhancing potential of provisions which, understandably, are appealing to corporate managers and promoters.[130] While certainly any corporate legislation enacted in Mississippi should create as favorable a climate for business as reasonably practicable, one must balance against this the possible prejudice to shareholders from the adoption of an overly lax standard.

The burgeoning case law involving hostile takeover bids and the permissible range of conduct by mangement in responding to them has brought into focus issues involving the duty of care and the business judgment rule with an intensity never before expierenced in American corporate law.[131] Moreover, suggestions

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[130] The Virginia Act contains other models on this point. In addition to possibly eliminating a meaningful duty of care, it includes a separate set of provisions dealing with "affiliated transactions" between a corporation and a potentially dominant shareholder. *See* VA. CODE ANN. §§ 13.1-725 to -728 (repl. vol. 1985). The clear thrust of these provisions is to discourage hostile takeover attempts, although the statute is admittedly more broadly drawn. *See* Murphy, *supra* note 125, at 124-27 (general discussion of provisions dealing with transactions between corporations and potentially dominant shareholders).

[131] *See, e.g.*, Hanson Trust PLC v. ML SCM Acquisition, Inc., 781 F.2d 264 (2d Cir. 1986); Norlin Corp. v. Rooney, Pace, Inc., 744 F.2d 255 (2d Cir. 1984); Gearhart Indus. v. Smith Int'l, Inc., 741 F.2d 707 (5th Cir. 1984); Buffalo Forge Co. v. Ogden Corp., 717 F.2d 757 (2d Cir. 1983); Mobile Corp. v. Marathon Oil Co., 669 F.2d 366 (6th Cir. 1981); Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981); Treadway Cos., Inc. v. Care Corp., 638 F.2d 357 (2d Cir. 1980); Crouse-Hinds Co. v. Inter North Inc., 634 F.2d 690 (2d Cir. 1980); Minstar Acquiring Corp. v. AMF, Inc., 621 F. Supp. 1252 (S.D.N.Y. 1985); Martin Marietta Corp. v. Bendix Corp., 549 F. Supp. 623 (D. Md. 1982); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986); Frantz Mfg. Co. v. EAC Indus., 501 A.2d 401 (Del. 1985); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985); Moran v. Household Int'l Inc., 490 A.2d 1059 (Del. Ch.), *aff'd*, 500 A.2d 1346 (Del. 1985); Veasey & Seitz, *supra* note 106, at 1489-93. For background on the various defense mechanisms utilized to combat hostile takeovers see A. FLEISCHER, TENDER OFFERS: DEFENSES, RESPONSES, AND PLANNING (1981); M. LIPTON & E. STEINBERGER, TAKEOVERS AND FREEZEOUTS (1978); Black & Smith, *Antitakeover Charter Provisions: Defending Self-Help for Takeover Targets*, 36 WASH. & LEE L. REV. 699 (1979); Friedenberg, *Jaws III: The Impropriety of Shark-Repellant Amendments as a Takeover Defense*, 7 DEL. J. CORP. L. 32 (1982); Gilson, *A Structural Approach to Corporations: The Case Against Defense Tactics in Tender Offers*, 33 STAN. L. REV. 819 (1981); Weiss, *Defensive Responses to Tender Offers and the Williams Act's Prohibition Against Manipulation*, 35 VAND. L. REV. 1087 (1982); Comment, *Delaware's Attempt to Swallow a New Takeover Defense: The Poison Pill Preferred Stock*, 10 DEL. J. CORP. L. 569 (1985); Note, *Target Defensive Tactics as Manipulative under Section 14(e)*, 84 COLUM. L. REV. 228 (1984); Note, *Protecting Shareholders Against Partial and*

that the protections of the business judgment rule have limited the duty of care to an aspirational function,[132] or that the duty of care is "dead,"[133] have been largely put to rest by *Smith v. Van Gorkom*[134] (the *"Trans Union"* case), in which the Delaware Supreme Court held that the board of directors of Trans Union Corporation was guilty of "gross negligence" in evaluating and recommending to the shareholders for approval a merger proposal.[135] The court imposed liability on them for the difference between the price paid by the purchaser and the "fair value" of the corporation's stock as of the date of the merger.[136]

Two-Tiered Takeovers: The "Poison Pill" Preferred, 97 HARV. L. REV. 1964 (1984); Note, *Tender Offer Defensive Tactics and the Business Judgment Rule*, 58 N.Y.U.L. REV. 621 (1983).

[132] *See* Hinsey, *supra* note 108, at 614-15.

[133] *See* Frankel, *supra* note 123, at 715-16.

[134] 488 A.2d 858 (Del. 1985).

[135] *Id.* at 881.

[136] *Id.* at 893. It is difficult to impart the full flavor of *Van Gorkom* without a detailed reading of the rather lengthy opinion. Essentially, Van Gorkom, Trans Union's chairman, formulated a plan to sell the corporation for $55 a share in a leveraged buyout and presented the plan to industrialist Jay Pritzker of Chicago. Although the corporation's chief financial officer had suggested that a feasible range for such a transaction was $50 to $60 per share, no extensive study on that question was undertaken; rather Van Gorkom seized upon the $55 figure as a price for which he would be willing to sell his 75,000 shares. Immediately before the merger was announced, the stock was selling at a high of $38.25 and a low of $29.50. The negotiations between Van Gorkom and Pritzker were private and not specifically authorized by the board; no price negotiations took place. When Pritzker presented a merger offer with a three day deadline, Van Gorkom called a board meeting for the next day; the notice did not disclose the purpose of the meeting. At the meeting, Van Gorkom made a twenty minute presentation concerning the proposal; he did not disclose the methodology by which he had arrived at the $55 price or that he proposed that price to Pritzker. The only other matters of substance presented to the board were (1) its attorney's advice that a fairness opinion was not required as a matter of law; (2) the chief financial officer's statement that $55 was in the range of a fair price; and (3) a supporting statement by the corporation's president. The entire meeting lasted abut two hours; the result was board approval of the merger agreement, which at that time (and indeed as of its execution) had not been read by any member of the board, including Van Gorkom. *Id.* at 866-69.

The court held that the directors (five inside and five outside) breached their "fiduciary duty" to shareholders by "their failure to inform themselves of all information reasonably available to them and relevant to their decision to recommend the Pritzker merger," thus denying them the protection of the business judgment rule. *Id.* at 893. The case was thereafter settled for $23,500,000. R. HAMILTON, CORPORATIONS 679 (3d ed. 1986).

Predictably, *Van Gorkom* has attracted a firestorm of controversy and commentary (both critical and supportive). *See, e.g.*, Chittur, *supra* note 105; Fischel, *The Business*

Clearly, then, this is an area of the law currently in a state of substantial ferment.

The fact that corporate law nationally is in a period of rapid change on these issues, coupled with the paucity of authority in Mississippi, leads to the conclusion that codification of the duty of care may be premature in this state. This is based on two

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Judgment Rule and the Trans Union *Case*, 40 BUS. LAW. 1437, 1455 (1985) (describing *Van Gorkom* as "one of the worst decisions in the history of corporate law") [hereinafter cited as Fischel, *Trans Union*]; Manning, *Reflections and Practical Tips on Life in the Boardroom after* Van Gorkom, 41 BUS. LAW. 1 (1985); Moskin, Trans Union*: A Nailed Board*, 10 DEL. J. CORP. L. 405 (1985); Prickett, *An Explanation of* Trans Union *to "Henny Penny" and Her Friends*, 10 DEL. J. CORP. L. 451 (1985); Quillen, Trans Union, *Business Judgment and Neutral Principles*, 10 DEL. J. CORP. L. 465 (1985); Schwartz & Wiles, Trans Union*: Neither "New" nor "Bad" Law*, 10 DEL. J. CORP. L. 429 (1985); Veasey & Seitz, *supra* note 106, at 1497-1503; Comment, *Mining the Safe Harbor? The Business Judgment Rule After* Trans Union, 10 DEL. J. CORP. L. 545 (1985); Baldo, *Delaware Rocks the Boat*, FORBES, April 8, 1985, at 126; Bordon, *First Thoughts on Decision in Delaware on* Trans Union, N.Y.L.J. Feb. 25, 1985, at 1, col. 3. The ultimate impact of the decision is, of course, unclear. Some see it as part of a continuing attempt by the Delaware Supreme Court to respond to those who criticize Delaware's corporate statutes as inadequately protecting the rights of shareholders, particularly those in the minority. *See, e.g.*, Fischel, *Trans Union, supra*, at 1454; Fischel, *Reflections, supra* note 14, at 923 (in recent decisions Delaware Supreme Court has limited discretion of managers and controlling sharehlders while increasing power of minority shareholders); *see also supra* note 14 and accompanying text (discussing criticisms of "liberal" statutes). On the other hand, the Delaware court has certainly proven itself to be capable of mercurial conduct in this regard. *E.g.*, *compare* Singer v. Magnavox Co., 380 A.2d 969, 979 (Del. 1977)(holding that controlling shareholders in "freezeout" merger must show legitimate business interest for merger other than sole purpose of eliminating minority shareholders) *with* Weinberger v. UOP, Inc., 457 A.2d 701, 703-04 (Del. 1983)(overruled business purpose test, substituted "intrinsic fairness" test and expanded appraisal valuation; thus absent egregious misconduct on part of controlling shareholders, minority's only remedy is appraisal); *see* Berger & Allingham, *A New Light on Cash-Out Mergers:* Weinberger *Eclipses* Singer, 39 BUS. LAW. 1 (1983); Note, *Freezeouts Under the 1983 Illinois Business Corporation Act: The Need for Protection of Minority Shareholders from "Going Private" Mergers*, 1985 U. ILL. L. REV. 679, 688-693 (1985). In any event, *Trans Union* demonstrates that the duty of care is not rendered an empty threat by the shield of the business judgment rule.

For another well-known (although arguably less dramatic) recent case imposing substantial liability for director misconduct see Francis v. United Jersey Bank, 87 N.J. 15, 432 A.2d 814 (1981), holding the estate of the widow of a reinsurance corporation's principal owner liable for over $10,000,000 in funds which her two sons, the other directors of the corporation, siphoned off in the form of bogus loans. *Id.* at 825-26. The court imposed liability on the basis of her negligence in failing entirely to undertake any effort whatsoever to acquaint herself with the affairs of the corporation. *Id.* Of course, because of her total lack of any action, the business judgment rule had no application to the claim. *See supra* note 113.

premises: first, that codification is not inherently superior to common law determinations of these issues; and second, that any statute adopted dealing with such currently controversial questions may not be determinative in the way courts decide cases.[137] The risk that a standard either unreasonably high or undesirably lax might be enacted may be too great until the present flux in decisional law is resolved.

Significantly, Illinois, which revised its business corporation act in 1983, incorporated much of the Exposure Draft of the RMA but deleted section 8.30 or any other codification of the duty of care.[138] It is recommended that Mississippi do likewise, with one exception. The express reliance provisions of Section 8.30 of the RMA[139] are reasonable and provide a desirable safe harbor for directors acting in good faith. It is suggested, however, that no other attempt to define the appropriate standard of conduct for directors should be made at this time. This approch would be consistent with that of Delaware, which provides for a right of reliance but which otherwise does not codify the duty of care.[140]

2. Duty of Loyalty.

Directors, as fiduciaries, owe a duty of undivided loyalty and utmost good faith to their corporations.[141] Broadly read, this

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[137] *See* Veasey & Seitz, *supra* note 106, at 1505. For example, a court may in effect exonerate a director acting in good faith regardless of the language of a statute.

[138] *See generally* ILLINOIS BUSINESS CORP. ACT OF 1983, ILL. REV. STAT. ch. 32, §§ 1.01-17.05 (Supp. 1983). Interestingly, Illinois adopted without substantial amendment the Exposure Draft provision on conflicts of interest. *Compare id.* § 8.60 *with* REVISED MODEL BUSINESS CORP. ACT § 8.31 (Exposure Draft March, 1983)(comparison of "conflict of interest" sections of Illinois Business Corporation Act of 1983 and Revised Model Business Corporation Act).

[139] REVISED MODEL BUSINESS CORP. ACT § 8.30(b), (c)(1984); *see supra* text accompanying note 117.

[140] *See* DEL. CODE ANN. tit. 8, § 141(e)(1983). Should a codified standard prove both desirable and feasible in light of subsequent developments, such action can, of course, be taken at that time.

[141] 3 W. FLETCHER, *supra* note 53, § 850; HENN & ALEXANDER, *supra* note 53, § 236, at 628. A classic statement of the principle is found in Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928)(Opinion by Cardozo, J.):

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behav-

duty restricts directors from competing with their corporations;[142] a more particularized application is the avoidance of transactions that involve conflicts of interest.[143]

The common law rule of automatic voidability of such transactions has long since been abandoned by most courts.[144] The modern approach by courts has been to emphasize the elements of fairness and disclosure; in many instances, ratification by a disinterested board of directors has the effect of shifting the burden of proving lack of fairness to the party challenging the transaction.[145] Nonetheless, lack of uniformity on the part of courts considering the issue has been the rule.[146]

Due in part to the lack of certainty engendered by the jurisprudence on the subject, the recent trend has been to enact statutory provisions dealing with conflicts of interest. The first state to do so was California; the Model Act added a similar provision

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ior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions.

Id. at 463-64, 164 N.E. at 546.

[142] HENN & ALEXANDER, *supra* note 53, § 236, at 628. The Mississippi Constitution and MBCA reflect this prohibition by requiring stockholder consent for a person who is "engaged or interested in a competing business either individually or as employee or stockholder" to be elected to the board of directors. MISS. CONST. art. 7, § 194; MISS. CODE ANN. § 79-3-67 (1972). As a practical matter, of course, this mandates disclosure and express stockholder approval. This is contrary to the common law rule, at least in the absence of detriment to the corporation. 3 W. FLETCHER, *supra* note 53, § 856.

[143] 3 W. FLETCHER, *supra* note 53, § 913; HENN & ALEXANDER, *supra* note 53, § 238.

[144] *See, e.g.*, 3 W. FLETCHER, *supra* note 53, § 917; Marsh, *Are Directors Trustees? Conflict of Interest and Corporate Morality*, 22 BUS. LAW. 35, 39 (1966) [hereinafter cited as Marsh].

[145] *See* HENN & ALEXANDER, *supra* note 53, § 238, at 638-40; Marsh, *supra* note 144; Hodge & Perry, *supra* note 2 at 388-89.

[146] *E.g.*, courts have differed on the following issues; (1) whether the interested director can be counted in determining the presence of a quorum of the board; (2) whether the vote of an interested director could be counted; and (3) whether a conflict of interest transaction was voidable on the basis of the conflict alone, on the basis of the conflict plus an element of bad faith or fraud, or on the basis of the conflict plus a showing of unfairness to the corporation. HENN & ALEXANDER, *supra* note 53, § 238, at 639-40. Most courts appear to concede that ratification by *shareholders* will validate the transaction, in the absence of fraud or unfairness; again, however, there is conflicting authority as to whether the vote of the interested director as a shareholder can be counted, although the majority answer seems to be affirmative. Marsh, *supra* note 143, at 48-49 & nn.50-51.

in 1966.[147] Currently at least thirty-eight states have adopted such statutes.[148]

The RMA carries forward the approach taken by former Model Act Section 41. Section 8.31 of the RMA provides in pertinent part:

> (a) A conflict of interest transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect interest. A conflict of interest transaction is not voidable by the corporation solely because of the director's interest in the transaction if any one of the following is true:
>
> (1) The material facts of the transaction and the director's interest were disclosed or known to the board of directors or a committee of the board of directors and the board of directors or committee authorized, approved, or ratified the transaction;
>
> (2) the material facts of the transaction and the director's interest were disclosed or known to the shareholders entitled to vote and they authorized, approved, or ratified the

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[147] HENN & ALEXANDER, *supra* note 53, § 238, at 640 n.10.

[148] *See* ALA. CODE § 10-2A-63 (1980); ARIZ. REV. STAT. ANN. § 10-041 (1977); CAL. CORP. CODE § 310 (WEST 1977); COLO. REV. STAT. § 7-5-114.5 (Supp. 1985); CONN. GEN. STAT. ANN. § 33-323 (West Supp. 1986); DEL. CODE ANN. tit. 8, § 144 (1983); FLA. STATE ANN. § 607.124 (West 1977); GA. CODE ANN. § 14-2-155 (1982); IDAHO CODE § 30-1-41 (1980); ILL. REV. STAT. ch. 32, ¶ 8.60 (1985); IND. STAT. ANN. § 23-1-35-2 (Supp. 1986); IOWA CODE ANN. § 496A.34 (West Supp. 1986); KAN. STAT. ANN. § 17-6304 (1981); KY. REV. STAT. ANN. § 271A.205 (Baldwin 1983); LA. REV. STAT. ANN. § 12.84 (West 1969); ME. REV. STAT. ANN. tit. 13-A, § 717 (1981); MD. CORPS & ASS'NS CODE ANN. § 2-419 (1985); MICH. COMP. LAWS ANN. § 450.1545 (West 1973); MINN. STAT. ANN. § 302A.255 (West 1985); MO. STAT. ANN. § 351.327 (Vernon Supp. 1986); MONT. CODE ANN. § 35-1-413 (1985); NEB. REV. STAT. § 21-2040.01 (1983); NEV. REV. STAT. § 78.140 (1985); N.H. REV. STAT. ANN. § 293-A:41 (Supp. 1985); N.J. STAT. ANN. § 14A:6-8 (West Supp. 1986); N.Y. BUS. CORP. LAW, § 713 (McKinney 1986); N.C. GEN. STAT., § 55-30 (1982); OHIO REV. CODE ANN. § 1701.60 (Page 1985); OKLA. STAT. ANN. tit. 18, § 1.175a (West 1986); OR. REV. STAT. § 57.265 (1984); PA. STAT. ANN. tit. 15, § 1409.1 (Purdon Supp. 1986); R.I. GEN. LAWS § 7-11-37.1 (1985); S.C. CODE ANN. § 33-13-160 (Supp. 1985); TENN. CODE ANN. § 48-1-816 (1979); VT. STAT. ANN. tit. 11, § 1888 (1984); VA. CODE ANN. § 13.1-691 (repl. vol. 1985); W. VA. CODE § 31-1-25 (1982); WIS. STAT. ANN. § 180.355 (West Supp. 1985); WYO. STAT. § 17-1-136.1 (Supp. 1985).

The Indiana and Virginia statutes cited above and the new Tennessee Business Corporation Act, effective 1987, have adopted section 8.31 without substantial change. *See* 1986 Tenn. Pub. Acts 887, § 8.31. For a discussion of the different approaches taken by various states see 2 REVISED MODEL BUSINESS CORP. ACT. ANN. 968-70 (3d ed. 1985); Note, *Director Conflict of Interest under the 1983 B.C.A.; A Standard of Fairness*, 1985 U. ILL. L. REV. 741, 743 n.12 (1985) [hereinafter cited as Note, *Fairness*].

transaction; or

(3) the transaction was fair to the corporation.[149]

Presumably few corporate practitioners in Mississippi would question the desirability of a statutory standard in this state. The confusion engendered by the leading Mississippi case, *Knox Glass Bottle Co. v. Underwood*,[150] has received extensive comment previously in this *Journal*,[151] and those discussions need not be repeated at length here. Suffice it to say that the opinion raises several troublesome questions: *e.g.*, whether ratification by disinterested directors is essentially irrelevant to the issue of the voidability *vel non* of a conflict of interest transaction;[152] whether the mere fact that an interested director represents

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[149] REVISED MODEL BUSINESS CORP. ACT § 8.31(a)(1984). The text of former section 41 is as follows:

> No contract or other transaction between a corporation and one or more of its directors or any other corporation, firm, association or entity in which one or more of its directors are directors or officers or are financially interested, shall be either void or voidable because of such relationship or interest or because such director or directors are present at the meeting of the board of directors or a committee thereof which authorizes, approves or ratifies such contract or transaction or because his or their votes are counted for such purpose, if:
>
> (a) the fact of such relationship or interest is disclosed or known to the board of directors or committee which authorizes, approves or ratifies the contract or transaction by a vote or consent sufficient for the purpose without counting the votes or consents of such interested directors; or
>
> (b) the fact of such relationship or interest is disclosed or known to the shareholders entitled to vote and they authorize, approve or ratify such contract or transaction by vote or written consent; or
>
> (c) the contract or transaction is fair and reasonable to the corporation.
>
> Common or interested directors may be counted in determining the presence of a quorum at a meeting of the board of directors or a committee thereof which authorizes, approves or ratifies such contract or transaction.

MODEL BUSINESS CORP. ACT. § 41 (1969). It should be noted that section 41 speaks in terms of disclosure of the "relationship or interest" of the director, while section 8.31 requires disclosure of the material facts of the transaction as well as the director's interest. As to the possible significance of this distinction see *infra* note 156.

[150] 228 Miss. 699, 89 So. 2d 799 (1956), *suggestion of error overruled per curiam*, 228 Miss. 699, 91 So. 2d 843, *cert. denied*, 353 U.S. 977 (1957).

[151] *See generally* Hodge & Perry, *supra* note 2, at 386-90 (discussion of director conflict of interest); Comment, *Transactions*, *supra* note 11, at 889-95.

[152] *See* Hodge & Perry, *supra* note 2, at 388 (discussion of *Knox Glass*). *But cf.* Comment, *Transactions*, *supra* note 11, at 894 (noting language in opinion that indicates that disclosure to and approval by disinterested majority of directors would validate transaction).

both himself and the corporation in the transaction renders it automatically voidable without regard to fairness;[153] and whether ratification by shareholders validates a transaction even though it may be unfair.[154] Clearly more specific direction than this is needed. It is debatable, however, whether that direction is adequately provided by the RMA.

It has been noted that existing conflict of interest statutes are generally narrow in scope,[155] and RMA Section 8.31 follows this pattern. The fundamental question, however, is precisely what it seeks to accomplish: does it state a rule by which a transaction can be *validated* for all purposes, or does it merely *save* a conflict of interest transaction from automatic voidability if the prescribed procedures are followed? Section 41 of the Model Act, and most existing state statutes, were ambiguous on this issue, and the RMA unfortunately carries forward this ambiguity. Arguably, the disjunctive nature of the statute suggests that *either* ratification by disinterested directors *or* ratification by disinterested shareholders *or* a showing of fairness will validate a transaction. Thus, in theory, an unfair transaction might be saved if proper ratification were effected.

The leading cases interpreting statutes similar to the Model Act have, admittedly, rejected this construction and held that ratification does not preclude judicial inquiry into the question of fairness.[156] This view, in turn, poses the question of what is

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[153] *See* Hodge & Perry, *supra* note 2, at 388 (discussion of *Knox Glass*); Comment, *Transactions, supra* note 11, at 894 (comparison of Model Act with Mississippi rule in *Knox Glass*). Indeed, the very sense in which the court used the term "representation" is unclear.

[154] Comment, *Transactions, supra* note 11, at 894.

[155] They do not address the types of transactions to which they are directed; do not refer to differing aspects of the duty of loyalty, such as competition with the corporation, corporate opportunities, or the use of corporate property, information or resources for personal gain; and do not extend to officers or major shareholders, or to those having close association with directors, officers, and major shareholders. Sommer, *The Duty of Loyalty in the ALI's Corporate Governance Project*, 52 GEO. WASH. L. REV. 719, 722 (1984) [hereinafter cited as Sommer].

[156] *See, e.g.*, Remillard Brick Co. v. Remillard-Dandini Co., 109 Cal. App. 2d 405, 241 P.2d 66, 86 (1952)(held directors in violation of fiduciary duty by entering contract on behalf of corporation); Fliegler v. Lawrence, 361 A.2d 218, 224-25 (Del. 1976)(directors must show fairness of transaction). In addition, most commentators have supported this view, although there is some opinion to the contrary. *See* Bulbulia & Pinto, *supra* note 14, at 207 nn. 47-48 (discussion of *Remillard Brick*). Perhaps the leading advocate

the effect of ratification. While many courts have held that it has the effect of shifting the burden of proof to those attacking the transaction, others have held that it simply lowers the standard of proof of fairness or that the burden remains on the director in all events.[157] The drafters of the Model Act were somewhat vague on the effect of section 41, stating only that its purpose was "not to provide a basis for validating for all purposes a contract or transaction . . . but simply to establish that such contract or transaction is not automatically void or voidable solely by reason of the director's interest."[158] No mention was made of burden of proof. Similarly, the comments to RMA Section 8.31 provide only that "[t]he sole purpose of section 8.31 is to sharply limit the common law principle of automatic voidability."[159] There is likewise no reference to burden of proof.

Given the significance of the question and the confusion that continues to cloud this area under current statutes, it seems

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of the latter position was Professor Ernest Folk, who argued that since the Delaware statute requires disclosure not only of the director's interest but of the material facts of the transaction, the purpose of the statute was to validate the transaction if any of the statutory tests were met. Thus, full disclosure would remove the question of fairness from court scrutiny so long as the requirement of approval by directors or stockholders was met. DEL. CODE ANN. tit. 8, § 144 (1974); E. FOLK, THE DELAWARE CORPORATION LAW 75-88 (1972). The effect would be to substitute full disclosure for fairness. Bulbulia & Pinto, *supra* note 14, at 213. However, the Delaware Supreme Court rejected Folk's position. Fliegler v. Lawrence, 361 A.2d 218, 224-25 (Del. 1976). Section 8.31 of the RMA, like Delaware but unlike Section 41 of the Model Act, requires disclosure of both the interest and material facts of the transaction. *See supra* note 149 and accompanying text.

[157] *See* Comment, *Transactions*, *supra* note 11, at 888 nn. 65-69 (discussion of burden of proof of interested directors).

[158] 1 MODEL BUSINESS CORP. ACT ANN. § 41, at 844 (2d ed. 1971). This avowal was somewhat undercut, however, by another statement that the section *"validates*, if the prescribed tests are satisfied, transactions with interested directors which common law rules often make voidable, if not void." *Id.* at 842 (emphasis added).

[159] REVISED MODEL BUSINESS CORP. ACT § 8.31 official comment (1984). The comments are somewhat more detailed on the question of validation, stating that:

> [T]he elimination of the automatic rule of voidability does not mean that all transactions that meet one or more of the tests set forth in section 8.31(a) are automatically valid. These transactions may be subject to attack on a variety of grounds independent of section 8.31—for example, that the transaction constituted waste, that it was not authorized by the appropriate corporate body, that it violated other sections of the [RMA], or that it was unenforceable under other common law principles.

Id.

clear that any conflict of interest statute that Mississippi adopts should state explicitly its purpose; or, whether it provides a procedure for absolute validation or whether it is merely a savings provision with procedural implications that retains fairness as the ultimate test of validity. Some recent statutes appear to take the former approach,[160] and arguments have been advanced that Mississippi should do so.[161] With deference, I disagree and believe that Mississippi should take the latter course.

The Exposure Draft of the RMA made it plain that the Draft was a savings provision and that ratification operated only to shift the burden of proof from the director to the person attacking the transaction.[162] This approach was ultimately aban-

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[160] The present California statute appears to validate for all purposes transactions ratified by disinterested *shareholders* without regard to fairness. *See* CAL. CORP. CODE § 310 & legislative committee comment (West 1977); Bulbulia & Pinto, *supra* note 14, at 218-23.

[161] *See* Comment, *Transactions, supra* note 11, at 899-900 (proposed absolute validation for Mississippi).

[162] REVISED MODEL BUSINESS CORP. ACT § 8.31 (Exposure Draft March, 1983):

> (a) If a transaction is fair to a corporation at the time it is authorized, approved, or ratified, the fact that a director or officer of the corporation has a direct or indirect interest in the transaction is not a ground for invalidating the transaction or for imposing liability on that director or officer.
>
> (b) In a proceeding contesting the validity of a transaction in which a director or officer has an interest, the person asserting validity has the burden of proving fairness unless:
>
> (1) the material facts of the transaction and the director's or officer's interest were disclosed or known to the board of directors or a committee of the board and the board or committee authorized, approved, or ratified the transaction by the vote of a requisite quorum of directors who had no interest in the transaction; or
>
> (2) the material facts of the transaction and the director's or officer's interest were disclosed to the shareholders entitled to vote and they authorized, approved, or ratified the transaction by the vote of a requisite quorum of shareholders who had no interest in the transaction.
>
> (c) The presence of, or votes entitled to be cast by, the director or officer who has a direct or indirect interest in the transaction may be counted in determining whether a quorum is present but may not be counted when the board of directors, a committee of the board, or the shareholders vote on the transaction.
>
> (d) For purposes of this section, a director or officer has an indirect interest in a transaction if an entity in which he has a material financial interest or in which he is an officer, director, or general partner is a party to the transaction. A vote or consent of that entity is deemed to be a vote or consent of the director or officer for purposes of subsection (c).

doned, however, and the drafters of the RMA returned to a more traditional approach.[163] Significantly, Professor Robert Hamilton, Reporter for the RMA, has expressed his strong disagreement with the decision of the Committee,[164] and one major state, Illinois, has adopted the substance of the Exposure Draft in its new business corporation act.[165]

I believe that the Illinois approach is sound and should be followed in Mississippi. To be sure, the attractions of a validat-

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Id. Moreover, the proposed comments to the Draft stated that " Section 8.31 validates only fair transactions and allocates the burden of proof on the issue of fairness." This was said to "follow the judicial construction placed on earlier versions of the Model Act dealing with the subject of self-dealing transactions." *Id.* official comment.

[163] The only official explanation for the change was that "adverse comments" were received on the proposed section. 2 REVISED MODEL BUSINESS CORP. ACT ANN. § 966 (3d ed. 1985); *see* Goldstein, *supra* note 8, at 1475-76 (explaining changes in two versions).

[164] Hamilton, *supra* note 8, at 1455, 1463, 1468 n.35

[165] ILL. ANN. STAT. ch. 32, ¶ 8.60 (1985):

> ¶ 8.60 Director conflict of interest.
>
> (a) If a transaction is fair to a corporation at the time it is authorized, approved, or ratified, the fact that a director of the corporation is directly or indirectly a party to the transaction is not grounds for invalidating the transaction.
>
> (b) In a proceeding contesting the validity of a transaction described in subsection (a), the person asserting validity has the burden of proving fairness unless:
>
> (1) The material facts of the transaction and the director's interest or relationship were disclosed or known to the board of directors or a committee of the board and the board or committee authorized, approved or ratified the transaction by the affirmative votes of a majority of disinterested directors, even though the disinterested directors be less than a quorum; or
>
> (2) The material facts of the transaction and the director's interest or relationship were disclosed or known to the shareholders entitled to vote and they authorized, approved or ratified the transaction without counting the vote of any shareholder who is an interested director.
>
> The presence of the director, who is directly or indirectly a party to the transaction described in subsection (1), or a director who is otherwise not disinterested, may be counted in determining whether a quorum is present but may not be counted when the board of directors or a committee of the board takes action on the transaction.
>
> For purposes of this Section, a director is "indirectly" a party to a transaction if the other party to the transaction is an entity in which the director has a material financial interest or of which the director is an officer, director or general partner.

Id. Unlike the Exposure Draft, Illinois (like most states) continues to limit its conflict of interest rules to directors, not nondirector officers. *See supra* note 162. For an analysis of the Illinois statute see Note, *Fairness, supra* note 148.

ing statute (particularly to corporate counsel) are obvious: it provides a substantial measure of predictability, and would seem to provide a far surer basis for an opinion on the enforceability of an interested party transaction. This, however, may be somewhat illusory; even validating statutes customarily require that ratification be made "in good faith,"[166] a notoriously elusive concept. Fundamentally, however, the potential for abuse militates against the adoption of a validating statute, or even one (like the present RMA) that could conceivably be so construed.[167] Ratification by directors, even if technically disinterested, may be tainted by their association with the interested director. Particularly if the interested director is a dominant member of the board, it may be disingenuous to believe that his colleagues could exercise independent judgment.

While shareholder ratification might, on the surface, provide a more substantial basis for validation, this likewise may be more apparent than real. The ease with which shareholder votes can be manipulated in public corporations is well known to anyone with experience in that type of representation. Moreover, the argument that any infirmity in the vote can be adequately avoided by preventing the interested director's shares from being counted towards a quorum or in the vote is too simplistic.[168] Section 8.31 of the RMA does not deal adequately with this problem. While the provision disqualifies the interested director from voting, it provides that a majority of the *remaining* shares constitutes a quorum for purposes of ratification, and a majority

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[166] *See, e.g.*, CAL. CORP. CODE § 310(a)(1977).

[167] Notwithstanding the substantial authority to the contrary and the avowals in the commentary to the RMA, the possibility of such a construction of § 8.31 should not be discounted. For example, the new Virginia Act adopts § 8.31 without substantial change. VA. CODE ANN. § 13.1-691 (repl. vol. 1985). The Joint Bar Committee appointed to study the draft statute stated in its commentary that while "[s]ome courts have read the fairness element into the disclosure and voting sections . . . [t]his section does not adopt this approach." VA. CODE COMM'N REPORT ON THE REVISION OF CHAPTERS 1 AND 2 OF TITLE 13.1 OF THE CODE OF VIRGINIA, H. DOC. NO. 13, App. 4, at 251 (1985) [hereinafter cited as VA. CODE COMM'N REPORT]. For an argument that the new Virginia Act does not depart from prevailing interpretations of prior law despite the uncertainty caused by the traditional formulation, see Murphy, *supra* note 125, at 111-12.

[168] *See* Comment, *Transactions*, *supra* note 11, at 899-900 (proposed preventing shares of interested directors from being counted).

vote of *those* shares will be sufficient to constitute ratification.[169] The result may be ratification by the majority of a minority of shares.[170] This hardly insulates the ratification from the influence of the interested director, since a quorum could be obtained without his shares but composed of a majority of shares sympathetic to his interests.

In sum, I submit that the approach of Illinois and the RMA, while surely not perfect,[171] best accommodates management's interest in stability and predictability with the need to provide protection to all shareholders, particularly those in the minority, against overreaching by members of management. Shifting the burden of proof upon ratification accomplished according to the prescribed procedure should provide adequate assurance to management that transactions for which there is no cause for concern will be upheld.[172] On balance, then, the enactment of a saving statute with an explicit allocation of the burden of proof best serves the interests of all of a corporation's constituent groups.[173]

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[169] REVISED MODEL BUSINESS CORP. ACT § 8.31(d)(1984).

[170] *Id.* official comment 2(b).

[171] One may legitimately question what "fairness" means. Clearly it has both procedural and substantive connotations; various definitions have been applied. For an extensive discussion of this question, see Bulbulia & Pinto, *supra* note 14, at 223-27. The Exposure Draft stated that a transaction would in most cases be deemed fair "if it is a transaction that might reasonably have been entered into at arms-length by disinterested persons." REVISED MODEL BUSINESS CORP. ACT § 8.31 official comment (Exposure Draft March, 1983); *see also* Note, *Fairness, supra* note 148, at 750-56 (recommending analytical approach to be taken to new Illinois statute).

[172] Of course, it would be naive to think that "grey area" questions will not arise, and it is surely possible that a transaction approved in good faith will later be ruled voidable upon the suit of shareholders on the basis of lack of fairness. The party primarily at risk in this instance is, however, the interested director. The business judgment rule should protect the other directors who either ratified the transaction or recommended its ratification to the shareholders. In the final analysis, then, such decisions may be for the most part a question of business risk for the interested director.

[173] The ALI Corporate Governance Project has taken an approach to this question that provides an interesting contrast to existing statutes and the RMA. For example, it extends the duty of loyalty to senior executives and dominating shareholders as well as directors; describes in detail the types of conduct which may involve breaches of the duty of loyalty; provides explicit allocation of the burden of proof; and is in general substantially more detailed than current statutes. *See generally* AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS, §§ 5.01-5.14 (Tent. Draft No. 5, April 15, 1986). For a discussion of an earlier draft of the ALI

3. Loans to Management.

The MBCA takes a simple approach to the question of loans to officers and directors: they are absolutely prohibited.[174] Historically, this was a common response to what was seen as an inherent possibility for abuse. As has been previously discussed in depth in this *Journal*, legitimate reasons exist for imposing restraints on the ability of a corporation to make loans to management.[175] In recent years, however, the trend has been to recognize that some such loans may have a legitimate purpose, and that an element of flexibility is desirable.[176] Thus, Mississippi is now one of but four states with an explicit statutory prohibition of all management loans.[177] Most states now provide limited circumstances under which such loans are valid,[178] a position first taken by the Model Act in 1969.[179] So long as the interests of shareholders, particularly those in the minority, are adequately protected, it would seem some modification of the rule of *per se* invalidity under the MBCA is in order.[180] Again, the question is

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duty of loyalty provisions, see Sommer, *supra* note 155, at 726-42.

[174] MISS. CODE ANN. § 79-3-89 (1972).

[175] *See* Hodge & Perry, *supra* note 2, at 390-92 (discussion of loans to officers and directors). For other background on the subject see Mann, *Moral and Ethical Problems: Loans to Management and Compensation Problems*, 31 BUS. LAW 1305 (1976); Rich, *Corporate Loans to Officers, Directors and Shareholders*, 14 BUS. LAW. 658 (1959).

[176] For example, strictly read, the MBCA could prohibit a salary advance to an employee.

[177] The others are Alaska, Nebraska, and Oklahoma. *See* ALASKA STAT. § 10.05.213 (1985); NEB. REV. STAT. § 21-2045 (1983); OKLA. STAT. ANN. tit. 18, § 1.175 (1986).

[178] 2 REVISED MODEL BUSINESS CORP. ACT ANN. 1018 (3d ed. 1985). Not all recent statutes, however, have followed the trend towards codification. For example, the new Virginia Act makes no provision, thereby treating director loans the same as any self-dealing transaction. *See* VA. CODE COMM'N REPORT, *supra* note 167, at 52.

[179] MODEL BUSINESS CORP. ACT § 47 (1969). The 1969 Model Act prohibited loans to directors unless authorized by the shareholders, but permitted loans to employees (including employees who were directors) if the board of directors determined that the loan might benefit the corporation. The comments to section 47 stated that "business purpose or benefit to the corporation" was the criterion for determining the validity of employee loans. 1 MODEL BUSINESS CORP. ACT ANN. § 47, ¶ 2, at 950-51 (2d ed. 1971).

[180] Arguably, of course, creditors are a second group whose interests should be considered in this regard. *See, e.g.*, Hodge & Perry, *supra* note 2, at 392 (suggesting that management loans should be subject to same limitations as corporate distributions in order to protect creditors). For a variety of reasons, I do not believe that the potential for prejudice to creditors is substantial enough to justify such a rule. At least insofar as the rights of contract creditors are concerned, other adequate safeguards exist. A major creditor could, for example, impose contractual limitations on management loans as a

whether the RMA provision accomplishes this purpose.

Section 8.32 of the RMA permits loans to directors under either of two circumstances. The first is that the loan is approved by a majority of the outstanding shares of all classes voting as a single voting group[181] with the interested director's shares being disqualified.[182] The second is that the board of directors determines that the loan benefits the corporation and approves either the particular loan or a general plan authorizing loans.[183]

I submit that each of these provisions should be modified before enactment in Mississippi. As to the first, one of the most compelling reasons for restricting loans to directors is to guard against majority oppression of minority shareholders,[184] particularly in closely-held corporations. Merely disqualifying the votes of the interested director himself does not, in my view, adequately guard against this possibility. On the other hand, in a public corporation (where such loans are less likely to occur on an individualized basis) no greater statutory protection is probably needed. Thus, section 8.32 should be amended to permit a corporation to impose a higher (even unanimous) vote requirement in its articles or bylaws. This would permit minority shareholders in a closely-held corporation to guard against such problems as a matter of negotiation at the time the corporation is formed.[185]

For similar reasons, the RMA goes too far in permitting the

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condition to the extension of credit. Even in the absence of such leverage, a contract creditor is always free to decline to extend credit if it believes that a corporation has an excessive amount of management debt. Involuntary or tort creditors, of course, have somewhat different standing; but neither the presence of legally available surplus (to use the MBCA standard) nor the mere solvency of a corporation (the RMA standard for distributions) assures an adequate fund for the satisfaction of claims.

Corporate distributions and applicable limitations thereon will be discussed in Part 2 of this article.

[181] The concept of voting groups under the RMA is discussed *infra* at notes 289-92 and accompanying text.

[182] Revised Model Business Corp. Act § 8.32(a)(1)(1984).

[183] *Id.* § 8.32(a)(2). In each instance, the RMA treats a corporate guarantee of a director's indebtedness the same as a loan.

[184] *See* Hodge & Perry, *supra* note 2, at 391 (suggested majority shareholders-directors could redirect corporate assets to themselves without stockholder vote).

[185] *Cf. id.* at 392 (discussion of prejudice to minority shareholders).

board to authorize particular loans without shareholder participation. Indeed, the interested director is not even disqualified by the statute from voting on his own loan. Thus, I would restrict the discretion of the board acting alone to approve general plans authorizing loans to directors (as well as officers and employees), an authority which presumably would encompass such matters as loans of petty cash, advances for expenses incurred in furtherance of the corporation's business, and employee benefit plans.[186] Major loans made on an ad hoc basis should be approved, if at all, only by the shareholders as discussed above.

C. Officers

Subchapter D of Chapter 8 of the RMA, dealing with corporate officers, is substantively different from the MBCA in only two respects. The first appears somewhat mundane, but represents a departure from prevailing practice in most states: the RMA does not prescribe the designation of any particular officers, and likewise has no prohibition against an individual holding any two or more offices at the same time.[187] The RMA approach in this regard is distinctly a minority one. At present, only four states have similar provisions.[188] Like most states,[189] the MBCA mandates a president, secretary, and treasurer.[190] The same person cannot be both president and secretary.[191]

The official explanation for deleting this statutory mandate in the RMA is that "little purpose is served by a statutory requirement that there be certain officers, and statutory requirements may sometimes create problems of implied or apparent authority or confusion with non-statutory offices the corporation

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[186] *See* REVISED MODEL BUSINESS CORP. ACT § 8.32 official comment (1984).

[187] REVISED MODEL BUSINESS CORP. ACT § 8.40(a), (d)(1984).

[188] The four are Delaware, Illinois, North Carolina, and New York. *See* DEL. CODE ANN. tit. 8, § 142 (1983); ILL. REV. STAT. ch. 32, § 8.50 (Smith-Hurd 1985); N.C. GEN. STAT. § 55-34 (1982); N.Y. BUS. CORP. LAW § 715 (McKinney 1986).

[189] *See* 2 MODEL BUSINESS CORP. ACT ANN. 1040-41 (3d ed. 1985)(listing of states requiring president, secretary, and treasurer).

[190] MISS. CODE ANN. § 79-3-95 (1972). The MBCA further requires "one or more vice presidents as may be provided in the bylaws;" of course, the bylaws may provide for no such officers. *Id.*

[191] *Id.*

desires to create."[192] Agency law questions aside, however, it is probable that the notion of mandated officers is so deeply engrained with most corporate practitioners that its elimination may engender more confusion than it saves. It is noteworthy that at least two states that have recently revised their corporate statutes with substantial reference to the RMA have rejected this provision, each continuing to require at least a president and secretary.[193]

Thus, it is recommended that Mississippi continue to require that a corporation have at least a president and secretary. On the other hand, logically the prohibition against one person holding those offices simultaneously should be eliminated[194] unless the bylaws provide otherwise. It would seem anomalous to permit a corporation to be governed by a board of directors composed of one person and, at the same time, require the fiction of a separate president and secretary. Admittedly, certain business transactions sometimes involve the performance of formal functions that would ordinarily require separate officers, such as cross-certification of the other's signature. It is unlikely, however, that this would pose a problem in the extremely closely-held corporation, and realistically it is only such a corporation that would avail itself of this option. Should the interests of the participants be better served by mandating that these offices be separated, an appropriate provision could be inserted in the bylaws.

The second distinction between the RMA and MBCA in this area is a matter of perhaps greater substance: as is true for directors, RMA Section 8.32 prescribes a standard of conduct for officers vested with "discretionary authority."[195] In most re-

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[192] REVISED MODEL BUSINESS CORP. ACT § 8.40 official comment (1984).

[193] *See* 1986 Tenn. Pub. Acts 887, § 8.40(a) (effective Oct. 1, 1987); VA. CODE ANN. § 13.1-872(A)(repl. vol. 1985). To be fair, however, the new Illinois Business Corporation Act follows the RMA in this regard, although it requires bylaw authority for an individual to hold more than one office simultaneously. ILL. REV. STAT. ch. 32, § 8.50 (Smith-Hurd 1985). Indiana likewise adopts the RMA but requires at least one officer. IND. STAT. ANN. § 23-1-36-1 (Burns Supp. 1986).

[194] This is the approach taken in Virginia. VA. CODE ANN. § 13.1-872(A), (D)(repl. vol. 1985).

[195] REVISED MODEL BUSINESS CORP. ACT § 8.42 (1984). Interestingly, there was an additional element of parallelism in the Exposure Draft that was not carried over to the

spects, this section is substantively identical to the provision for directors,[196] the sole difference being a more limited "safe harbor" right of reliance.[197]

Primarily for the reasons previously discussed relating to the duty of care of directors,[198] this provision of the RMA should not be adopted. Although it is clear that officers, as fiduciaries, owe duties of care and diligence to their corporations,[199] few states, even those codifying a standard for director conduct, have attempted to define statutorily the scope of officers' duties.[200] Moreover, at least three states adopting much of the RMA deleted section 8.42.[201] Fundamentally, though, I believe that such efforts are premature for Mississippi, and would recommend that no similar statute be enacted here.[202]

D. Indemnification

Subchapter E of Chapter 8 of the RMA composes in its entirety a set of complex, and potentially controversial, provisions involving the indemnification of corporate directors, officers, agents, and employees. The current "crisis" (perceived or real)

RMA. In the Exposure Draft, the rules on conflicts of interest embraced officers as well as directors. As previously noted, the final draft of RMA Section 8.31 speaks only of directors, a decision with which I personally agree. It is curious, however, that neither the official comment to the RMA nor the commentary in the new Revised Model Business Corporation Act Annotated addresses the rationale for this change.

[196] *See supra* text at note 117.

[197] The statute does not grant an officer the right to rely upon data supplied by a committee of the board. *Compare* REVISED MODEL BUSINESS CORP. ACT § 8.30(b)(3)(1984)(director is entitled to rely on reports by committee of board of which he is not a member and which he reasonably believes merit confidence) *with id.* § 8.42(b) (officer is entitled to rely on reports prepared by employees whom he reasonably believes to be competent or legal counsel as to matters within the person's expert competence). Presumably this reflects the greater degree of familiarity with corporate affairs that can reasonably be demanded of officers. *See id.* § 8.42 official comment.

[198] *See supra* notes 99-140 and accompanying text.

[199] *See* HENN & ALEXANDER, *supra* note 53, §§ 231-234 (discussion of duties of management).

[200] *See* 2 REVISED MODEL BUSINESS CORP. ACT ANN. 1068 (3d ed. 1985).

[201] These states are Illinois, Indiana, and Virginia. Tennessee, however, adopted it without change. 1986 Tenn. Pub. Acts 887, § 8.42.

[202] I would include in this recommendation the right of reliance for officers, although certainly this aspect of the statute is less objectionable than the overall effort to define a standard of conduct.

surrounding the imposition of liability on corporate fiduciaries for breach of their managerial responsibilities, coupled with increasing restrictions on the availability and coverage of directors and officers ("D & O") insurance, has focused heretofore unparalleled attention on this area.[203] Clearly an entire article could be devoted to this one topic, but such an exegesis is beyond the scope of this work. In order to maintain this discussion within manageable bounds, some comments concerning the approach to be taken are in order.

First, the Mississippi law on indemnification[204] and its relationship to the 1969 Model Act have been extensively developed previously in this *Journal*.[205] That discussion is important as background to much that is to follow, since I will undertake no such detailed comparison here. Rather, other than a brief summary of existing Mississippi law, this article will focus on the RMA and its approach to the issue.

Second, this article will accept the premise that the obvious trend nationwide is towards broad indemnification provisions, as evidenced by the fact that at least thirty-five states have adopted at least substantial equivalents to either the 1969 Model Act or the RMA, although the exact detail of such statutes varies fairly widely from state to state.[206] As will be seen, the MBCA approach is considerably out of step with current statutes; thus some modification of existing Mississippi law is in order. On the other hand, I believe that in some respects modern statutes may go too far,[207] although my views on this are not as

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[203] An excellent comprehensive text is J. BISHOP, THE LAW OF CORPORATE DIRECTORS AND OFFICERS: INDEMNIFICATION AND INSURANCE (1982) [hereinafter cited as BISHOP, INDEMNIFICATION]. For general background on recent issues in this area, see Hinsey, *The New Lloyd's Policy Form for Directors and Officers Insurance—An Analysis*, 33 BUS. LAW. 1961 (1978); Johnson, *Corporate Indemnification and Liability Insurance for Directors and Officers*, 33 BUS. LAW. 1993 (1978) [hereinafter cited as Johnson].

[204] MISS. CODE ANN. § 79-3-7(o)(1972).

[205] *See* Hodge & Perry, *supra* note 2, at 393-98 (discussing Mississippi law on indemnification and its relationship to 1969 Model Act).

[206] *See* 2 REVISED MODEL BUSINESS CORP. ACT ANN. 1093-99 (3d ed. 1985)(containing detailed analysis of existing statutes). Since that annotation was prepared, Indiana, Tennessee, and Virginia have substantially adopted the RMA provisions.

[207] For example, under a 1986 amendment to its corporation laws, the board of directors of a Delaware corporation can adopt a general authorization of advancement of expenses to a director or officer, rather than requiring a case-by-case determination of

extreme as some.[208] Thus, the primary purpose of this discussion will be to suggest those respects in which the RMA, the approach of which is generally recommended, should be modified to conform with sound policy. The goal, as it has been stated, should in all instances be to strike the balance between encouraging managers not to violate their duties, and discouraging them from serving at all.[209]

In order fully to evaluate the desirability of the RMA approach to indemnification and related issues, however, a brief summary of current Mississippi law is necessary. The operative provision is section 79-3-7(o) of the MBCA. Following the pattern of earlier versions of the Model Act, it only establishes the corporate *power* to indemnify; indemnification is thus elective, never mandatory.[210] Indemnification extends only to directors and officers and persons who served at the corporation's request as a director or officer of a subsidiary corporation or a corporation of which it is a creditor. It speaks only of "expenses actually and reasonably incurred" in the defense of a civil or criminal action, suit, or proceeding. Thus, the power to indemnify for

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the entitlement to such, with the corresponding commitment by the recipient being limited to an agreement to reimburse the corporation only if he is affirmatively determined not to be entitled to indemnification. DEL. CODE ANN. tit. 8, § 145(3)(1986). Moreover, the state now provides that the provisions of the Act on advancement of expenses, as well as indemnification, are expressly non-exclusive. *Id.* § 145(f).

Indeed, in an unprecedented move, the Delaware Legislature has empowered corporations to adopt charter provisions or amendments that eliminate or limit the personal liability of directors for breaches of the duty of care, although liability cannot be limited for a director who breaches his duty of loyalty, does not act in good faith, engages in intentional misconduct or a knowing violation of the law, receives an improper personal benefit, or pays an illegal dividend or approves an illegal stock repurchase. *Id.* § 102(b)(7). According to a synopsis of the new legislation, the legislature is responding to "recent changes in the market for directors' liability insurance" resulting in an unavailability of traditional policies, or any type of policy from traditional insurance carriers. *Cf.* Johnson, *supra* note 203, at 2035-36 (suggesting that statutes fixing maximum liability for certain claims may be desirable in order to allow management and insurers to evaluate legal risks they are assuming).

[208] *See, e.g.*, Bishop, *Sitting Ducks*, *supra* note 14 (discussing criticism of trend toward permissive or management-oriented statutes).

[209] Johnson, *supra* note 203, at 1994.

[210] For discussions of the power of indemnification at common law, see J. BISHOP, INDEMNIFICATION, *supra* note 203, ¶¶ 5.01-5.05; HENN & ALEXANDER, *supra* note 53, § 379; Cheek, *Control of Corporate Indemnification: A Proposed Statute*, 22 VAND. L. REV. 255, 258-61 (1969)[hereinafter cited as Cheek].

judgments, settlements, or attorney's fees is unclear. Moreover, no distinction exists between third party and derivative actions. Indemnification is prohibited if the director or officer is adjudged liable for negligence, misconduct, or violations of the Mississippi antitrust or fair trade statutes; no other standard or conduct is addressed. The statute is expressly non-exclusive, and it permits "any other indemnification" authorized by the articles, bylaws, or shareholder resolution. However, it imposes no specific limitations on the ability of a corporation to make indemnification that might contravene public policy.[211] Finally, the statute does not refer to either advancement or expenses of insurance.[212]

In contrast, Sections 8.50 through 8.58 of the RMA set forth a detailed and integrated set of rules dealing with indemnification. The source of the provisions was an amendment to the 1969 Model Act adopted in 1980. The RMA reorganizes that provision to add clarity without altering its substance.[213] In general, it deals with indemnification of three types: permissive, mandatory, and court ordered. It also incorporates an extensive and extremely useful set of definitions which apply only to subchapter E.[214]

Section 8.51 establishes the criteria for permissive (or discretionary) indemnification. Under that section an individual who is or was a director and who is made a party to a proceeding[215] may be indemnified so long as he acted in good faith and, in addition, meets the following tests: (1) in the case of conduct in his official capacity, he reasonably believed his conduct was in

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[211] MISS. CODE ANN. § 79-3-7(o)(1972); Hodge & Perry, *supra* note 2, at 393-97 (corporation may make indemnification in any situation authorized by articles of incorporation, bylaws, or stockholders' resolution).

[212] *See* Hodge & Perry, *supra* note 2, at 397-98.

[213] *See* 2 REVISED MODEL BUSINESS CORP. ACT ANN. 1088-91 (3d ed. 1985). Thus, an extremely valuable source document for understanding the RMA rules on indemnification is *Changes in the Model Business Corporation Act Affecting Indemnification of Corporate Personnel*, 34 BUS. LAW. 1595 (1979) (report of the Committee on Corporate Laws) [hereinafter cited as *Changes Affecting Indemnification*], which details the new law and the respects wherein it differs from the 1969 Model Act.

[214] REVISED MODEL BUSINESS CORP. ACT ANN. § 8.50 (1984).

[215] "Proceeding" is defined as "any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative and whether formal or informal." *Id.* § 8.50(7).

the corporation's best interest; (2) if not acting officially, he reasonably believed his conduct was at least not opposed to the corporation's best interest; and (3) if in a criminal proceeding, he had in addition to the above no reasonable cause to believe his conduct was unlawful.[216]

Under this section indemnification is prohibited in two instances: (1) in a derivative action where the individual was adjudged liable to the corporation; and (2) in any other proceedings where liability is imposed on the grounds that the individual received an improper personal benefit.[217] Finally, in a derivative action permissive indemnification is limited to expenses (which expressly includes attorneys' fees[218]) incurred in connection with the action.[219]

This much of the RMA appears to strike an appropriate balance between the interests of the corporation and management. While it certainly will allow indemnification of directors adjudged liable for certain breaches of duty so long as the applicable standard of conduct is met,[220] sufficient procedural safeguards are established elsewhere by the RMA to make the likelihood of abuse remote.[221] Before discussing those safeguards, however, the more potentially controversial area of mandatory indemnification must be considered.

Section 8.52 provides that a director who is "wholly success-

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[216] *Id.* § 8.51(a). A separate standard of conduct exists for ERISA claims. *Id.* § 8.51(b) & official comment 2.

[217] *Id.* § 8.51(d).

[218] *Id.* § 8.50(3).

[219] *Id.* § 8.51(e). The commentary explains that this is intended to prevent the corporation from seeking to indemnify a director for a settlement which the director has paid to the corporation. Judgments would of course be excluded by § 8.51(d)(1). *See id.* § 8.51(e) & official comment 5 (limits indemnification in suits brought by or in right of corporation for expenses incurred in connection with proceedings in order to avoid circuity that would be involved if corporation sought to indemnify directors for payments made in settlement by director to corporation).

[220] It should be noted that the standard defined in § 8.51 is not a purely subjective one; rather, both the subjective test of good faith *and* the objective test of *reasonable* belief must be met. Arguably this could work to the detriment of the "honest but dumb" director. At the same time, however, it serves as a check upon the ability to indemnify a party who may be admittedly liable. For criticism of the objective standard see Cheek, *supra* note 210, at 279-80.

[221] *Cf.* Hodge & Perry, *supra* note 2, at 395-96 (discussing similar issues under 1969 Model Act).

ful on the merits *or* otherwise" in a proceeding is entitled to payment of his reasonable expenses.[222] The idea that the director must be "wholly successful" is a salutary one; it is intended to preclude the possibility of partial indemnification of a director who successfully defends some but not all counts, a result that had been reached under other statutes.[223] The objection to the statute, however, should be obvious: the "or otherwise" language could make mandatory the indemnification of a director who, for example, might be liable for breach of the duty of loyalty yet have a valid procedural defense such as the statute of limitations.[224]

Admittedly, this provision appears in most indemnification statutes. The justification given by the drafters of the RMA for this seeming anomaly is that a defendant with a valid procedural defense should not be put to the burden of a long and expensive trial on the merits merely to establish his right to indemnification.[225] While this may doubtless have merit in some situations, I believe that for public policy reasons *mandatory* indemnification should be limited to persons who are successful on the merits.[226] I submit that this imposes no undue burden on the director with a valid procedural defense, because the RMA would still allow him to seek permissive indemnification, so long as the requirements of section 8.51 are met,[227] or to seek court-ordered indemnification[228] in other instances.[229]

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[222] REVISED MODEL BUSINESS CORP. ACT § 8.52 (1984)(emphasis added).

[223] *Id.* official comment. The notorious case to the contrary was Merritt-Chapman & Scott Corp. v. Wolfson, 321 A.2d 138 (Del. 1974), which held that a defendant who successfully obtained the dismissal of some but not all counts of an indictment was entitled to partial indemnification. *Id.* at 141.

[224] Hamilton, *Reflections*, *supra* note 8, at 1465 n.30.

[225] REVISED MODEL BUSINESS CORP. ACT § 8.52 official comment (1984); Hamilton, *Reflections*, *supra* note 8, at 1465 n.30; *see also* BISHOP, INDEMNIFICATION, *supra* note 203, ¶ 6.12, at 70 (defendant who is otherwise successful by pleading statute of limitations creates no right to indemnity, which may encourage unnecessary prolongation of costly litigation).

[226] This is the approach taken in California. *See* CAL. CORP. CODE § 317(d) (West 1985)(mandatory indemnification is limited to persons who are successful on merits of their suit).

[227] *See supra* notes 215-21 and accompanying text.

[228] *See infra* notes 230-32 and accompanying text.

[229] *Cf.* Cheek, *supra* note 210, at 282-83 n.117 (limiting mandatory indemnification to persons successful on merits of suit does not impose harsh burden on those who win

The third method of indemnification under the RMA is that by court order. Subject to limitation in the articles of incorporation, a director may apply to the court conducting a proceeding or another court of competent jurisdiction for an order of indemnification.[230] Indemnification can then be ordered in two instances: first, to enforce a right to mandatory indemnification;[231] or second, because the court determines that "the director is fairly and reasonably entitled to indemnification in view of all the relevant circumstances," whether or not his conduct meets the standard of section 8.51 or notwithstanding that he was adjudicated liable in a derivative action or for receipt of an improper personal benefit. In this latter instance, however, indemnification is limited to reasonable expenses incurred.[232]

On balance, the RMA provision on court-ordered indemnification appears to be a desirable addition. Changes in control, for instance, may motivate a corporation to refuse to make mandatory indemnification or to decline a request for permissive indemnification without valid reason. Some enforcement or review mechanism is, therefore, clearly indicated.

In order to obtain discretionary indemnification under sec-

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on technicalities). It would seem unlikely that a corporation would, for example, refuse to indemnify a director who clearly meets the standard of § 8.51; even if it should, however, the director would still have recourse to a court to seek an order compelling indemnification on that basis. *See* REVISED MODEL BUSINESS CORP. ACT § 8.54(2) (1984)(director is entitled to indemnification in view of all relevant circumstances whether or not he met standards in § 8.51 or was adjudged to be liable).

[230] REVISED MODEL BUSINESS CORP. ACT § 8.54 (1984).

[231] *Id.* § 8.54(1)(1984). In this instance the court is also required to award the director his expenses incurred in obtaining court-ordered indemnification. *Id.*

[232] *Id.* § 8.54(2). Thus court-ordered indemnification would be the sole means whereby a director could obtain indemnification with respect to derivative suits or improper benefit. *Id.* official comment.

Of course, one might question the appropriateness of granting *any* indemnification to a director who has been adjudged liable to his corporation for breach of duty. The drafters of the RMA apparently felt, however, that an absolute prohibition on such awards was less desirable than delegating such discretion to a presumably impartial court. While this provision may provide some comfort to management, it seems unlikely that such awards would be made with any frequency. Only in truly extraordinary circumstances (as, for example, where a court might establish a new legal standard of conduct much stricter than a director could have reasonably anticipated) would it seem possible that a court would take such action. Johnson, *supra* note 203, at 1997. In any event, the right to seek such indemnification can be eliminated in the corporation's articles. REVISED MODEL BUSINESS CORP. ACT § 8.54 official comment (1984).

tion 8.51, a director must first establish that he has met the standards established by that section.[233] The determination of eligibility is to be made by either (1) a majority of a quorum of directors not parties to the proceeding, or, if such a quorum cannot be obtained, by majority vote of a committee appointed by the entire board, which consists of two or more directors who are not parties;[234] (2) by special legal counsel;[235] (3) or by the shareholders excluding the votes of directors who are parties to the proceeding.[236] Assuming that it is determined that indemnification is permissible, the RMA then requires a separate authorization of indemnification, which is usually made by the same body which determined that indemnification was permissible.[237]

To be sure, this procedure can be criticized on various grounds.[238] On the whole, however, I believe that it provides a

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[233] REVISED MODEL BUSINESS CORP. ACT § 8.55(a) (1984).

[234] *Id.* § 8.55(b)(1) & (2)(1984).

[235] *Id.* § 8.55(3). By use of the term "special legal counsel," the RMA has reference to attorneys with no prior professional relationship to those seeking indemnification, who are retained for the special occasion, and who are neither inside counsel or regular outside counsel. *Id.* official comment. In so doing, the RMA wisely avoids the ambiguities posed by some statutes (including earlier versions of the Model Act) which speak of "independent legal counsel." *See*, BISHOP, INDEMNIFICATION, *supra* note 203, ¶ 6.03[9], at 45-46 (requisite independence of "independent legal counsel" is uncertain); Johnson, *supra* note 203, at 1998-99 (indemnification under Delaware law must be authorized upon determination by board of directors or by "independent legal counsel" or by stockholders). On the other hand, the RMA rejects the approach of at least one state, Ohio, in defining the counsel eligible to serve. *See* OHIO REV. CODE § 1701.13(E)(4) (Page 1985)(counsel cannot quality as "independent" if he or his firm has been retained by or has performed services for corporation or person to be indemnified within previous five years); *Changes Affecting Indemnification, supra* note 213, at 1612 (characterization of legal counsel authorized to make required determination has been changed from "independent" to "special"; change is not intended to indicate that counsel chosen should not be independent in accordance with governing ethical precepts).

[236] REVISED MODEL BUSINESS CORP. ACT § 8.55(b)(4)(1984).

[237] *Id.* § 8.55(c). The exception is where special legal counsel determined the permissibility of indemnification, in which event authorization is made by the body empowered to appoint counsel under § 8.55(b)(3). According to the comments, the factors to be considered in this authorization include the reasonableness of expenses, the financial ability of the corporation to pay, and the extent to which resources should be allocated to this or some other purpose. *Id.* official comment.

[238] For example, one might question the extent to which other directors can truly exercise disinterested judgment when dealing with a colleague. Moreover, it is doubtful whether many attorneys would be willing to opine as to such matters, rendering this an impracticable alternative. *See* Johnson, *supra* note 203, at 1999 (discussing problems inherent in obtaining opinion of independent counsel); *cf.* Hodge & Perry, *supra* note 2, at

workable structure that adequately protects the interests of shareholders, with two exceptions. First, I do not believe that the decisions on eligibility or authorization should be delegated to a committee. If a quorum of disinterested directors (*i.e.*, directors not parties to the proceeding) cannot be obtained, eligibility should be determined only by special counsel or the shareholders,[239] with the final decision on authorization left to the shareholders alone. The participation of interested directors should be limited solely to the designation of special counsel in instances where that alternative is adopted.[240]

Second, I would enact the requirement imposed by the 1979 amendments to the Model Act, as modified in part in the RMA, that any indemnification of a director made in accordance with the statute be reported in writing to the shareholders either prior to or together with the notice of the next succeeding shareholders' meeting.[241] Such disclosure may provide a significant procedural safeguard against abuse of the indemnification process and should be adopted by Mississippi.[242]

One of the most practically important aspects of indemnification under the RMA is the authorization of advancement of

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395-96 (determinations made by independent legal counsel are questionable but lack of reasonable alternatives makes solution acceptable).

[239] This was the approach of the 1969 Model Act. MODEL BUSINESS CORP. ACT § 5(d) (1969).

[240] This, of course, would necessitate rewording of § 8.55(b) and (c) to conform with this result. The drafters of the RMA take the position that the somewhat more extensive role sanctioned by § 8.55 is "justified by a principle of necessity." REVISED MODEL BUSINESS CORP. ACT § 8.55 official comment (1984). While it is surely true that it facilitates the process, particularly in the publicly-held corporation, in this respect the RMA seems to swing the balance too far in the interests of management.

[241] REVISED MODEL BUSINESS CORP. ACT § 16.21(a)(1984); MODEL BUSINESS CORP. ACT § 5(1)(1980). By use of the words " in accordance with," the 1979 amendment contemplated not only any indemnification made under the statute, but also pursuant to a charter, bylaw, or other provision in accordance with the statute. The Committee on Corporate Laws apparently believed that reporting of mandatory or court-ordered indemnification was not mandated by § 5(1). *See Changes in Indemnification*, *supra* note 213, at 1615 (reporting of indemnification payments or advances to nondirectors not required by § 5(1)). The "in accordance with" language would, however, seem broad enough to encompass this as well.

[242] *See* Cheek, *supra* note 210, at 288 (such notice is necessary to provide full protection to corporate officers and thus has been adopted for inclusion in proposed model statute); Hodge & Perry, *supra* note 2, at 396 (same).

expenses, a provision that, as previously noted, is absent in Mississippi. Under section 8.53, advancement or payment of reasonable expenses can be made if (1) the director states in writing his good faith belief that he meets the criteria of section 8.51; (2) the director undertakes in writing to repay the advance if it is ultimately determined that he did not meet the applicable standard; and (3) a determination is made pursuant to the procedure of section 8.55 that " the facts then known . . . do not preclude indemnification."[243]

Given the potentially crushing burden of legal expenses alone in protracted proceedings, this provision is clearly reasonable. Without it, eventual indemnification may as a practical matter be meaningless to the director who has already suffered financial ruin as a result of legal fees. While one might argue that the "undertaking" to repay should be secured in order to guarantee repayment, this may work only to discriminate unfairly against the less wealthy director who cannot afford security.[244] Moreover, the same procedure for determining eligibility and authorizing payment must be followed as for discretionary indemnification, again providing an adequate safeguard against abuse.

As previously noted, the MBCA only specifically extends the power to indemnify to directors and officers, although the "any other indemnification" language could be construed to allow indemnification of agents and employees pursuant to provisions in the articles, bylaws, or by shareholder resolution. The RMA separately provides for indemnification of officers, employees, and agents, and treats them in a manner distinct from directors in some instances. In substance, the operation of Section 8.56 of the RMA is as follows: officers, employees, and agents of the corporation who are not directors may receive discretionary indemnification on the same basis as directors under section

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[243] Revised Model Business Corp. Act § 8.53(a), (c)(1984).

[244] Johnson, *supra* note 203, at 1999. Moreover, as previously noted in this *Journal*, "inability to pay" is a risk taken not only by the corporation which makes advances; the corporation itself may be financially unable to provide discretionary indemnification which is clearly justified, or mandatory indemnification pursuant to a court decree. *See* Hodge & Perry, *supra* note 2, at 397 (corporation may be financially unable to indemnify director even though he is entitled to indemnification as matter of right).

8.51. In light of their different capacities and the different duties that may attach thereto, however, the RMA also allows a corporation to provide *broader* indemnification rights than does the statute, whether by the articles, bylaws, board action or contract, subject only to the overriding limitation of public policy. Second, officers who are not directors (but not employees or agents) have the same right to mandatory indemnification as directors. In each of these cases, however, the articles can limit the rights otherwise granted by statute. Finally, directors who also serve in another capacity are in all events limited to indemnification under the other sections of subchapter E.[245]

Clearly it is salutary to extend indemnification to employees and agents. The major disadvantage of the RMA is the lack of clarity in the "public policy" limitation to the expansion of indemnification rights for non-director officers, employees and agents.[246] While the interests of simplicity would be served by making the indemnification provisions for such persons coextensive with those of directors, the RMA is probably correct in concluding that different considerations might apply to them that would make the limitations imposed upon director indemnification inappropriate. Moreover, any board action in this regard is subject to the obligations of the duty of care, and just as broader rights can be extended by corporate action, even the statutory rights can be eliminated by provision in the articles.

On a related point, even as to directors the RMA is nonexclusive; that is, it recognizes that corporations may make provisions for indemnification of directors in their articles, bylaws, or otherwise. This would permit, for example, a provision mandating indemnification that would otherwise be permissive, or commitments to indemnify directors to the fullest extent permitted by law.[247] The RMA, however, clarifies an ambiguity in earlier versions of the Model Act and in some other states with nonexclusive provisions by explicitly providing that such provisions

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[245] REVISED MODEL BUSINESS CORP. ACT § 8.56 & official comment (1984).

[246] *Cf.* Johnson, *supra* note 203, at 2009-11 (since limits of permissible indemnification are unclear under existing law, adoption of bylaw or charter provisions stating that corporation shall indemnify directors and officers "to the full extent permitted by law" may be best alternative).

[247] REVISED MODEL BUSINESS CORP. ACT § 8.58(a) official comment (1984).

must be consistent with subchapter E.[248] Thus under no circumstances can indemnification for directors be broadened beyond that permitted by the RMA. The RMA approach is desirable and should be followed.

The final significant provision of subchapter E involves directors and officers insurance,[249] an issue not addressed by the MBCA.[250] Generally D & O coverage has two aspects: reimbursement to the corporation for amounts paid to individuals pursuant to indemnification laws, and direct liability coverage to directors and officers for liabilities and expenses for which a corporation cannot legally indemnify them, such as liability to the corporation itself for negligence. This latter coverage would also extend to instances where the corporation could make indemnification but does not, either because it is insolvent or control has changed.[251]

A potentially controversial aspect of the RMA is that it, like many modern statutes,[252] permits the corporation to purchase insurance for a director, officer, agent or employee, against lia-

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[248] *Id.* The question frequently posed was whether a nonexclusive statute could be effectively circumvented merely by provisions in the articles or bylaws, and the extent of public policy restraints on such provisions. *See, e.g.*, BISHOP, INDEMNIFICATION, *supra* note 203, ¶ 6.03[1][a] (discussing ambiguities arising from use of nonexclusive language and extent to which courts will enforce); Cheek, *supra* note 210, at 276-78 (nonexclusive clause minimizes effectiveness by injecting elements of uncertainty as to how far courts will allow corporations to go); Hodge & Perry, *supra* note 2, at 396-97 (limitations on indemnification are easy to circumvent); Johnson, *supra* note 203, at 1996 (bylaws or agreements could be drafted providing for more extensive protection than specified in other provisions of nonexclusive statutes although public policy limits extent to which bylaws or agreements may exceed statutory formulation).

[249] Presumably the "other indemnification" language of MISS. CODE ANN. § 79-3-7(o)(1972) could be construed to authorize the purchase of such insurance.

[250] For general background on D & O insurance policies see BISHOP, INDEMNIFICATION, *supra* note 203, ¶¶ 8.01-8.07; Hinsey, *supra* note 108; Johnson, *supra* note 203, at 2012-36.

[251] *See* BISHOP, INDEMNIFICATION, *supra* note 203, ¶ 8.03[1] (any cost which is lawfully indemnifiable is also "insurable"); Johnson, *supra* note 203, at 2013-23, 2034-36 (discussing coverage of D & O policies and liabilities that cannot be covered by corporate indemnification or D & O liability insurance). Of course, various exclusions exist, those most notable being uninsurable risks and matters such as dishonesty, self-dealing, and willful misconduct. Johnson, *supra* note 203, at 2035.

[252] *E.g.*, CAL. CORP. CODE § 317(i) (West 1985) (corporation may purchase insurance on behalf of agent of corporation against liability whether or not corporation would have power to indemnify agent against such liability under provisions of this section).

bilities arising from his status as such, whether or not the corporation would have the power to indemnify him under sections 8.51 and 8.52.[253] Arguments have been made on policy grounds that the corporation's power to purchase insurance should be limited to liabilities for which statutory indemnification is permitted.[254] That objection, however, seems misplaced, because the exclusions contained in D & O policies are consistent with generally accepted notions of public policy. Moreover, the statute does not make an uninsurable risk insurable.[255] The effect, then, is to render the purchase of insurance by the corporation a form of compensation, which should be a matter within the board's discretion.[256] Thus, I would recommend the adoption of section 8.57 in its present form.

E. Shareholders[257]

1. Voting of Shares.

The most obvious and potentially significant departure of the RMA from the MBCA provisions on voting is the elimination of compulsory cumulative voting. A majority of states now make cumulative voting elective.[258] Mississippi is one of a handful that has a constitutional mandate for cumulative voting.[259]

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[253] REVISED MODEL BUSINESS CORP. ACT § 8.57 (1984).

[254] *See, e.g.*, Hodge & Perry, *supra* note 2, at 397 (current Model Act authorizes corporations to purchase insurance covering liability of director even if corporation would not have power to indemnify him against such liability).

[255] Johnson, *supra* note 203, at 1999-2000, 2016-21, 2034-36.

[256] *But cf.* Cheek, *supra* note 210, at 273-74 (although insurance should be considered compensation, director indemnification should not be considered justified as part of executive's compensation protecting him against future liability which has not arisen since payment is predicated on determinations of liability or on settlements, in which case corporations must reimburse executive).

[257] This section will discuss shareholders only in the context of their general role in the statutory scheme of management and control. Other issues relating to capitalization (*e.g.*, preemptive rights), shareholder litigation, and shareholders in the context of the closely-held corporation will be dealt with in Part 2 of this article.

[258] 1 REVISED MODEL BUSINESS CORP. ACT ANN. 676 (3d ed. 1985). The 1950 Model Act, upon which the MBCA was based, made cumulative voting mandatory. Beginning in 1960, however, the option of permissive cumulative voting was recognized, and the 1969 Model Act eliminated mandatory cumulative voting altogether as an option in section 33. *Id.* at 673.

[259] MISS. CONST. art. VII, § 194. The others are Arizona, Idaho, Kentucky, Missouri, South Dakota, and West Virginia. *See* ARIZ. CONST. art. XIV, § 10; IDAHO CONST. art. XI,

Section 7.28(b) of the RMA denies the right of cumulative voting unless the corporation "opts in" by its articles of incorporation.[260]

Whether accomplished by an "opt in" or "opt out" provision, mandatory cumulative voting should be eliminated in Mississippi. Given its traditional justification, *i.e.*, the facilitation of minority representation on the board of directors, the broad reasons for this recommendation are twofold: in the public corporation, it serves little purpose at all, and in the closely-held corporation, it does not provide an efficient, or even effective, means to its avowed end.

Specifically, in the public corporation it is unlikely that any group of shareholders will pool sufficient votes, and then cumulate their votes with the requisite common guiding intelligence, to alter the outcome of an election where management has solicited proxies. Thus, in most instances mandatory cumulative voting serves only to unnecessarily complicate the election process.[261]

In the closely-held business, there are other devices that are simply more effective in ensuring minority representation on the board such as shareholders' agreements providing for the election of certain persons, classification of shares with different classes entitled to elect a specified number of directors, or supermajority vote provisions which could give the minority an

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§ 4; Ky. Const. § 207; Mo. Const. art. XI, § 6; S.D. Const. art. XVII, § 5; W. Va. Const. art. XI, § 4.

An extensive body of literature exists debating the merits of cumulative voting. For general reference see Axley, *The Case Against Cumulative Voting*, 1950 Wis. L. Rev. 278; Bhagat & Brickley, *Cumulative Voting: The Value of Minority Shareholder Voting Rights*, 27 J. Law & Econ. 339 (1984); Easterbrook & Fischel, *Voting in Corporate Law*, 26 J. Law of Econ. 395 (1983); Sobieski, *In Support of Cumulative Voting*, 15 Bus. Law. 316 (1960); Sturdy, *Mandatory Cumulative Voting: An Anachronism*, 16 Bus. Law. 550 (1961); Young, *The Case for Cumulative Voting*, 1950 Wis. L. Rev. 49.

[260] Revised Model Business Corp. Act § 7.28(b)(1984).

[261] This situation assumes, of course, the ordinary election in which there has been no countervailing solicitation by an insurgent group seeking to oust incumbent directors. It is only fair to say that these are contrary views of cumulative voting in public corporations. *See, e.g.*, Bhagat & Brickley, *supra* note 259, at 340-41 (discussing proponents' arguments in favor of cumulative voting); Sobieski, *supra* note 259, (importance of cumulative voting to minority shareholders); Young, *supra* note 259, at 49-56 (arguing in favor of statute granting shareholders the right to cumulative voting).

effective veto of any election that did not include minority representation.[262] The "protection" of cumulative voting is more apparent than real, since its impact can easily be undercut by staggering the board of directors or simply reducing the size of the board.[263] Indeed, mandatory cumulative voting may be directly disadvantageous to minority stockholders, in that it may obscure the need for more explicit and careful planning of the parties' relationship.[264]

To be sure, the issues involved in eliminating mandatory cumulative voting are not entirely clear cut, and substantial debate continues on the question. Still, Mississippi is in a shrinking minority in rendering it nonelective. Of course, cumulative voting should be available as a planning device to those who desire it. It should not, however, be forced arbitrarily upon those corporations for which it is clearly inappropriate. Thus, I would recommend the amendment of the Mississippi Constitution to eliminate compulsory cumulative voting and the enactment of an elective provision similar to the RMA.

On the other hand, if the election of cumulative voting is made, the RMA engrafts procedural impediments upon the exercise of that right which should not be adopted. Specifically, even if cumulative voting rights exist, under the RMA shares cannot be voted cumulatively unless the notice of the meeting or proxy statement states conspicuously that cumulative voting is authorized, or a shareholder gives not less than 48 hours notice of his

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[262] *See, e.g.*, HENN & ALEXANDER, *supra* note 53, § 265, at 719 (discussing voting alternatives within closely-held corporations); Comment, *The Constitutionality of the 1983 Illinois Business Corporation Act's Voting Provisions*, 1985 U. ILL. L. REV. 647, 653 (discussing effects of cumulative voting). Certain of these devices will be discussed in Part 2 of this article.

[263] *See* HENN & ALEXANDER, *supra* note 53, § 189, at 496 (outlining ways to weaken cumulative voting); Hamilton, *Reflections*, *supra* note 8, at 1468-69 (discussing effects of cumulative voting). In Mississippi, reduction of the board's size could be accomplished by amendment of the by-laws by the board, absent contrary provision in the articles. MISS. CODE ANN. §§ 79-3-51, -69 (1972). Classifying or staggering the board must, however, be authorized by the articles, so that admittedly it is procedurally more difficult to achieve. *Id.* § 79-3-71.

[264] *Cf.* Hamilton, *Reflections*, *supra* note 8, at 1468-69 (corporations may be willing to structure transactions in manner which circumvents statute giving impression that statute provides greater protection than actually exists).

intent to cumulate.[265] If the corporation elects cumulative voting, there seems to be no justification for permitting such obvious methods of circumventing that right. No sanction is imposed by the RMA on management for failing to give such notice (although it is required by the SEC proxy rules),[266] and it is unlikely that the average shareholder would have sufficient sophistication and knowledge of the law to expect him to comply. Only a few states have adopted similar notice requirements[267] and the drafters' assertion that it is intended to ensure that all voting shareholders understand the rules is not compelling.[268] This provision, then, should be eliminated in Mississippi.

A final aspect of section 7.28 that deserves comment is the provision for the election of directors by a plurality of votes.[269] Prior versions of the Model Act were simply silent on the question of the vote required to elect a director,[270] although there seems to be a common assumption that it is by a plurality.[271] The MBCA likewise makes no such reference.[272] As a practical matter, of course, this rule is necessary in any corporation where shares are factionalized to the extent that no group can muster a majority of votes. Since the RMA provides a corporation the op-

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[265] REVISED MODEL BUSINESS CORP. ACT § 7.28(d)(1984).

[266] 17 C.F.R. § 240.14a-101(5)(c)(1986). Likewise, it would be only fair to note that the SEC has generally encouraged cumulative voting whenever it has been in a position to do so. HENN & ALEXANDER, *supra* note 53, § 189, at 497-98 n.24.

[267] 1 REVISED MODEL BUSINESS CORP. ACT ANN. 676 (3d ed. 1985).

[268] *See* REVISED MODEL BUSINESS CORP. ACT § 7.28 official comment (2)(1984).

[269] REVISED MODEL BUSINESS CORP. ACT § 7.28(a)(1984). It should be noted that the RMA adopts the general rule of one vote per share subject to contrary provisions in the articles. The Exposure Draft took the position that different voting rights could be extended to shares of the same class. REVISED MODEL BUSINESS CORP. ACT § 7.21 official comment (1)(Exposure Draft March, 1983). The RMA deleted this statement, thereby casting doubt on the question. In any event, under the MBCA nonvoting common stock is not permitted and all common stock, regardless of class, has the right to one vote per share. MISS. CODE ANN. §§ 79-3-27, -63 (1972). The RMA provides desirable flexibility for control arrangements in the closely-held corporation and is preferable. This issue will be more fully developed in Part 2.

[270] *See, e.g.*, MODEL BUSINESS CORP. ACT § 35 (1969)(no mention of voting requirements for election of director).

[271] *See, e.g.*, HENN & ALEXANDER, *supra* note 53, § 189, at 494 (discussing voting techniques used to elect directors).

[272] *See* MISS. CODE ANN. § 79-3-69 (1972)(no mention of voting requirements for election of director).

tion of selecting a different regime, this is an appropriate clarification of existing law.

The RMA would effect a needed change in Mississippi law by providing some guidance on the circumstances under which a proxy may be irrevocable. The MBCA makes no reference to irrevocable proxies,[273] thus leaving the question to be resolved by application of the common law doctrine of proxies coupled with an interest. Section 7.22 of the RMA provides that a proxy will be irrevocable if it so states in a conspicuous manner and if the appointment is coupled with an interest; it then enumerates non-exclusive examples of such appointments.[274] In addition, a safe harbor provision permits the corporation to accept a proxy's authority notwithstanding the death or incapacity of the granting shareholder unless notice is received before the proxyholder votes.[275]

The RMA also contains various provisions of an essentially procedural nature that would be desirable additions to the MBCA. For example, section 7.04 elaborates on the process of effecting shareholder action by unanimous consent, clarifying (as is true for directors) that such action can be taken by signing separate documents describing the action taken. Moreover, notice of such action must be given to holders of any nonvoting shares who would have been entitled to notice of a meeting.[276] Unlike the corresponding provision for directors,[277] however, section 7.04 is curiously ambiguous on the question of the effective time of such consent and the right of a shareholder to withdraw

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[273] *See id.* § 79-3-63 (statute dealing with voting of shares).

[274] REVISED MODEL BUSINESS CORP. ACT § 7.22(d)(1984). Proxies coupled with an interest include those held by a pledgee, a purchaser of the stockholder's shares, a creditor of the corporation who required the appointment as a condition to the extension of credit, an employee of the corporation whose contract required appointment, or a party to a shareholders' voting agreement. Any such appointment is revoked when the interest is extinguished. *Id.* § 7.22(f).

[275] *Id.* § 7.22(e). The rule at common law, of course, is that death or disability of the shareholder revokes a proxy automatically. HENN & ALEXANDER, *supra* note 53, § 196. The RMA also protects a bona fide purchaser of shares as to which an irrevocable proxy has been given. If the certificate (or information statement for shares without certificates) does not conspicuously note the appointment, such a purchaser has the right to revoke the appointment. REVISED MODEL BUSINESS CORP. ACT § 7.22(g).

[276] *Id.* § 7.04(a),(d).

[277] *See supra* notes 90-91 and accompanying text.

his consent. The comments assert that consent action is effective only when the last consent is received by the secretary of the corporation and that any shareholder is free to withdraw his consent before that time;[278] explicit language to that effect in the statute itself seems a preferable alternative.

Recognizing that the shares of many publicly held companies are registered in the name of a nominee, the RMA permits (but does not require) corporations to establish procedures whereby the beneficial owners of such shares can be "recognized" by the corporation as the shareholders.[279] Although the extent of this recognition is to be as defined in the procedure, the comments clearly contemplate the right not only to receive communications but also to vote the shares so registered, thus bypassing the nominee.[280]

A feature of the RMA that is of particular benefit to the publicly held company is the fairly detailed set of rules in section 7.24 dealing with a corporation's acceptance of votes, consents, waivers, or proxy appointments.[281] Recurring and frequently vexing problems arise in attempting to reconcile and decipher ambiguous signatures or those that do not correspond to the corporation's records, and section 7.24 provides needed measures of guidance and protection. In particular, the corporation is authorized to reject any vote or related document if the responsible officer has a good faith, reasonable belief about the validity of the signature or about the signatory's authority to sign for the corporation, and both the corporation and responsible officer are absolved from liability for a rejection which meets this standard.[282]

An important change in the RMA appears in the general provisions concerning voting. Under the MBCA, shareholder action is deemed effective if there is a quorum at the meeting and there is an affirmative vote of a majority of the shares repre-

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[278] REVISED MODEL BUSINESS CORP. ACT § 7.22 official comment 2 (1984).

[279] *Id.* § 7.23(a).

[280] *Id.* official comment.

[281] *Id.* § 7.24. The comments to this section are particularly useful in illustrating the possible applications of the rules to various situations.

[282] *Id.* § 7.24(c).

sented at the meeting.[283] The effect of this is to treat an abstention as a negative vote. In some instances this may lead to anomalous results. Shareholders who may be indifferent to the resolution of a specific matter may effectively defeat it simply by manifesting that indifference. The RMA adopts a rule that is probably more consistent with a layperson's expectation, that being that action is effective if the votes cast in favor of an action exceed those cast against it, subject to contrary provisions of the articles or the statute.[284] This may, of course, lead to approval by less than a majority of a quorum, but the basis for the RMA rule is at least as rational as the traditional response to abstentions and should be adopted.

On an issue, the RMA contains a blanket authorization for supermajority quorum or voting requirements for any shareholder action; such provisions must of course appear in the articles. A procedural safeguard also prevents alteration of any such provision except by compliance with the standard that is the subject of the proposed amendment.[285]

In one respect, the RMA would create an ambiguity that does not exist under the MBCA. Section 61 of the MBCA allows the articles of incorporation to set a less-than-majority quorum requirement for shareholders, but not less than one-third.[286] Apparently in the belief that the one-third limitation was unduly restrictive, the RMA eliminated that provision.[287] Section 7.27, however, authorizes only a *greater* than majority quorum. By implication, this would prohibit a *less* than majority quorum, absent some modification of the statutory language. Thus, section 7.27 should be amended to permit the articles to fix a quorum requirement of no fewer than one-third of the shareholders.[288]

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[283] MISS. CODE ANN. § 79-3-61 (1972).

[284] REVISED MODEL BUSINESS CORP. ACT § 7.25(c)(1984).

[285] *Id.* § 7.27. Thus a provision requiring the affirmative vote of 80% of all shares to take action could not be amended except by the same vote.

[286] MISS. CODE ANN. § 79-3-61 (1972).

[287] REVISED MODEL BUSINESS CORP. ACT § 7.25 official comment 5 (1984).

[288] This is also the rule as to directors. *See id.* § 8.24(a), (b); *see also supra* note 94-95 and accompanying text.

The RMA treats differently the issue of the withdrawal of directors or shareholders once a quorum is constituted. Under section 8.24(c), a quorum must at all times be pre-

Older versions of the Model Act and the MBCA recognized the right of certain classes of shares to vote separately on some issues.[289] The RMA introduces the general notion of voting by voting group. A voting group is defined as "all shares of one or more classes or series that under the articles of incorporation or this Act are entitled to vote and be counted together collectively on a matter at a meeting of shareholders."[290] Thus, preferred shares with class voting rights in the MBCA would be considered a voting group under the RMA, as would common shares with special voting rights, which are currently not permitted by the MBCA.[291]

The effect of sections 7.25 and 7.26 of the RMA is to impose on each voting group separately the quorum and voting rules of the Act. Thus, if separate approval of a voting group is required for a transaction, the quorum and voting standards must be met for each voting group.

On the other hand, section 1.40 provides that "[a]ll shares entitled by the articles of incorporation or this Act to vote generally on [a] matter are for that purpose a single voting group."[292] Thus, if a class of shares is to be treated as a voting group, appropriate provisions to that effect must be made in the articles. Draftsmen thus should be aware that separate voting

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sent in order for a valid board vote to take place. Thus, directors may prevent action from being taken by simply withdrawing from the meeting. REVISED MODEL BUSINESS CORP. ACT § 8.24(c)(1984). This is not possible under section 7.25(b); once a share is represented at a meeting of shareholders for any purpose (including objection to the transaction of business), it is deemed to be present thereafter at all times for purposes of determining a quorum. *Id.* § 7.25(b). This rule also applies to any adjournment for which a new record date is not set. Thus shareholders cannot withdraw and "break the quorum," an issue upon which courts have reached different conclusions. REVISED MODEL BUSINESS CORP. ACT §§ 7.25(c) & official comment 3, 8.24(c)(1984); *see also* 1 REVISED MODEL BUSINESS CORP. ACT ANN. 653 (3d ed. 1985); Murphy, *supra* note 125, at 91. The wording of the MBCA suggests that a quorum must be present at all times in order for shareholders to act. *See* MISS. CODE ANN. § 79-3-61 (1972)(if quorum is present, affirmative vote of majority of represented shares is act of all shareholders in absence of other statutory requirements).

[289] *See, e.g.*, MISS. CODE ANN. §§ 79-3-119, -145, -157, -167, (1972)(dealing with rights of holders of outstanding shares, rights of stockholders to dissent, and voluntary dissolution by shareholders).

[290] REVISED MODEL BUSINESS CORP. ACT § 1.40(26)(1984).

[291] *See supra* note 262.

[292] REVISED MODEL BUSINESS CORP. ACT. § 1.40(26)(1984).

rights must be specifically conferred by the articles unless provision therefor is otherwise made by the RMA itself.

2. Inspection Rights.

At common law, shareholders were granted the right to inspect the books and records of the corporation at proper times and places and for a proper purpose. In practice, however, that right was often an empty one, since the burden of establishing the propriety of his purpose was, at least in earlier cases, imposed upon the shareholder.[293] As a practical matter the right could be enforced only by a mandamus action, the delay and expense of which in many cases simply foreclosed the issue. As a result, Mississippi, like most states, passed remedial legislation to make the right of inspection a more realistic one.[294] Under traditional statutes such as the MBCA, however, a number of problems remain.

The MBCA grants the statutory right of inspection only to shareholders who either have held their shares for at least six months or who own at least one percent of all outstanding shares. This does not prohibit those who cannot meet the requisite standard from obtaining inspection since the common law right is specifically preserved. The advantage of the statutory right, of course, is that while the shareholder must state his purpose in writing, the burden of proving that it is improper is on the corporation. The relevance of the size or length of time of a shareholder's ownership to the propriety of his purpose is, however, far from clear. Thus it is doubtful whether this limitation serves any rational policy.[295]

Moreover, the sanction for wrongful refusal to allow inspection is a penalty of ten percent of the value of the shares owned by the shareholder, assessed against the corporation or its officer or agent responsible for the refusal. In practice, however, the *in terrorem* effect of this has been questionable. The value of the shareholder's stock may be minimal and thus the penalty may

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[293] *See* 5 W. FLETCHER, *supra* note 53, § 2214; HENN & ALEXANDER, *supra* note 53, § 199, at 537 (discussing common law right of shareholders to inspect records).

[294] *See* MISS. CODE ANN. § 79-3-99 (1972)(any shareholder holding for six months preceding demand or holding at least 1% of all outstanding shares has right to examine books and records for proper purpose).

[295] *See* 4 REVISED MODEL BUSINESS CORP. ACT ANN. 1725 (3d ed. 1985).

be negligible. Moreover, even if the penalty would be substantial, courts have shown but little inclination to assess it.[296] Indeed, the enforceability of similar statutes has sometimes been questioned on the basis that the penalty had no relation to actual damages.[297]

In other respects, the MBCA is simply undesirably vague. For example, while the shareholder is accorded the right to examine certain books and records "and to make extracts therefrom,"[298] the meaning of this is ambiguous—does it, for example, give the shareholder (or his agent and attorney) only the right to copy by hand, or must the opportunity to photocopy be provided? Obviously the right to inspect could be substantially frustrated if the statute is read literally, as representatives of a corporation may be inclined to do.

Chapter 16 of the RMA, dealing with records and reports, makes substantial improvements to the traditional approach of the MBCA. Section 16.01 mandates that a corporation maintain generally the same records as does the MBCA: actions of the directors and shareholders, accounting records, and a record of shareholders.[299] Additionally, it requires that the corporation keep at its principal office a number of essentially public records (*e.g.*, its articles, bylaws and annual report) as to which shareholders are given an absolute right to inspect.[300]

The heart of the RMA inspection provisions is section 16.02,

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[296] For a collection of the few reported cases on the issue see *id.* at 1765-67.

[297] *See, e.g.*, Schaefer v. H.B. Green Transp. Line, Inc., 232 F.2d 415 (7th Cir. 1956), holding such a statute unenforceable. *Id.* at 417. The basis for the decision was that the plaintiff, an Illinois resident of an Iowa corporation doing business in both states, could not extend extraterritorially the penalty provision of Illinois law where Iowa law made no such provision. *Id.*

[298] MISS. CODE ANN. § 79-3-99 (1972).

[299] REVISED MODEL BUSINESS CORP. ACT § 16.01(a)-(c)(1984). In some instances, the RMA description is somewhat more exact. In addition to "minutes of the proceedings of shareholders and directors" as required by the MBCA, the RMA includes all actions taken by consent or without a meeting (as by conference telephone call) and all actions taken by committees. *Id.* § 16.01(a). In addition, the RMA specifies that the shareholders' list must be in alphabetical order, a logical requirement omitted by the MBCA. *Id.* § 16.01(b). Finally, one difference in nomenclature exists: the RMA requires "appropriate accounting records," while the MBCA dictates "correct and complete books and records of account." *Id.*

[300] REVISED MODEL BUSINESS CORP. ACT §§ 16.01(e), 16.02(a)(1984).

which seeks to strike a balance between the interests of shareholders and corporations. Section 16.02 eliminates any distinction based on time or size of stockholdings, and the statutory right is extended to all shareholders. On the other hand, in order to inspect records of the actions of directors and shareholders, acounting records, and the record of shareholders, a shareholder must meet a somewhat more detailed standard. He must make his demand in good faith and for a proper purpose, must describe with reasonable particularity his purpose and the desired records, and those records must be directly connected to his stated purposes.[301] The avowed goal is to force the shareholder to make a more "meaningful" statement of the reasons he seeks inspection.[302]

In addition to this specific right of inspection, section 16.02 also recognizes the shareholders' separate rights to inspect the record of shareholders in connection with the annual meeting,[303] and to obtain information pursuant to discovery in litigation with the corporation.[304] As with the MBCA, the common law right of inspection is specifically preserved.[305]

The RMA also prohibits a corporation from limiting the statutory right of inspection by its articles or bylaws.[306] While the public policy implicit in the MBCA provision would seem to prevent this, some state statutes have permitted "reasonable" restrictions and an explicit denial of this power is desirable.

The RMA also substantially alters the procedure for enforcing inspection rights. The financial penalty for unjustified refusal to permit inspection is eliminated. Instead, section 16.04

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[301] *Id.* § 16.02(b), (c). The MBCA requires only that the shareholder make a "written demand stating the purpose thereof."

The RMA does not purport to define "proper purpose," although the official comment to section 16.02 states that it means "a purpose reasonably relevant to the demanding shareholder's interest as a shareholder." *Id.* § 16.02 official comment. This, in turn, begs the question of what "interest" means. *See, e.g.*, State ex rel. Pillsbury v. Honeywell, Inc., 291 Minn. 322, 191 N.W.2d 406, 411 (1971)("interest" contemplates concern with investment return). For a collection of cases on this issue see 3 REVISED MODEL BUSINESS CORP. ACT. ANN 1737-46 (3d ed. 1985).

[302] REVISED MODEL BUSINESS CORP. ACT § 16.02 official comment 3 (1984).

[303] *See id.* §§ 7.20, 16.02.

[304] *Id.* § 16.02(e)(1).

[305] *Id.* § 16.02(e)(2).

[306] *Id.* § 16.02(d).

authorizes a shareholder to institute a judicial proceeding to compel inspection of the records covered by either 16.02(a) or (b).[307] If inspection is ordered and the corporation cannot carry its burden of proving that it refused inspection due to a good faith, reasonable doubt that the shareholder had the right to inspect the requested records, the shareholder is entitled to payment of his costs including reasonable attorney's fees.[308] In order to prevent abuses by a shareholder, however, the court ordering inpection can place reasonable restrictions on use or dissemination of the information he obtains.[309]

The RMA also clarifies the scope of the inpection right, providing that the right to "inspect and copy" under section 16.02 includes, where reasonable, the right to receive photographic or similar copies, for which the corporation can assess a reasonable charge not exceeding the estimated cost of production or reproduction.[310]

The RMA provisions on inspection, then, eliminate certain restrictions imposed without rational basis by the MBCA as well as many of the ambiguities of our present law. Thus, I would recommend the adoption of sections 16.01 through 16.04 of the RMA without change.

3. Dissemination of Financial Information.

Historically state corporation statutes have done little affirmatively to mandate the disclosure of any information to shareholders. This has been true even though those same statutes sanction the device of proxy voting, by which a shareholder can empower another person (often a member of management) to vote his shares for him. The result has been a system whereby, absent the elaborate disclosure rules applicable to companies registered under the Securities Exchange Act of

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[307] *Id.* § 16.04(a)(b).

[308] *Id.* § 16.04(c). In contrast, the MBCA lists a number of specific acts of shareholder misconduct which provide a defense to a shareholder's claim to a penalty. *See* MISS. CODE ANN. § 79-3-99 (1972)(corporation has defense if shareholder improperly used information from prior examination, did not act in good faith, or has offered shareholder's list for sale).

[309] REVISED MODEL BUSINESS CORP. ACT § 16.04(d)(1984).

[310] *Id.* § 16.03(b), (c).

1934,[311] management can solicit proxies for its re-election without providing a shareholder with any information whatsoever concerning the condition of his company.[312]

Like most states, Mississippi only requires a corporation to provide a shareholder with financial information upon his written request.[313] The RMA adopts a considerably more detailed and burdensome requirement. Under section 16.20, every corporation is required annually to furnish each shareholder its annual financial statements, including a balance sheet as of the end of the fiscal year, an income statement for that year, and a statement of changes in shareholders' equity for that year.[314] The corporation must mail the statements within 120 days of the end of the year to existing shareholders and thereafter during the ensuing year to any new shareholder who makes a written request.[315] Under the RMA, this obligation is mandatory and cannot be altered by the articles or bylaws.

While the intent of the RMA is laudable, I believe that it places an unnecessary burden on many closely-held corporations, the shareholders of which may be generally familiar with the corporation's condition due to their active participation in its affairs. On the other hand, I do not believe that simply leaving mandatory disclosure to the arena of the federal securities laws is the appropriate answer since many corporations which should legitimately be considered as publicly-held would not

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[311] Under § 12(g)(1) of the Act, every issuer with total assets exceeding $1,000,000 and a class of equity security held of record by 500 or more persons must register that security. 15 U.S.C. § 781(g)(1982). By rule the asset threshold was increased to $3,000,000 in 1982, 17 C.F.R. § 240.12 g-1 (1986), and to $5,000,000 in 1986. 51 Fed. Reg. 25,360 (1986).

[312] *See, e.g.*, MISS. CODE ANN. § 79-3-63 (1972)(no mention of necessity of disclosure when soliciting proxies); FREY, CHOPPER, LEACH & MORRIS, *supra* note 53, at 428-29 (outlining proxy solicitation procedure). Indeed the inadequacy of state law in this area was a primary impetus to the promulgation of the proxy regulations of the SEC.

[313] Under Section 99 of the MBCA, a shareholder is entitled to receive the corporation's "most recent financial statements showing in reasonable detail its assets and liabilities and the results of its operations." MISS. CODE ANN. § 79-3-99 (1972). The overwhelming majority of states follow this pattern. 4 REVISED MODEL BUSINESS CORP. ACT ANN. 1773-74 (3d ed. 1985).

[314] REVISED MODEL BUSINESS CORP. ACT § 16.20(a)(1984). The statements are not absolutely required to be prepared on the basis of generally accepted accounting principles (GAAP), but must be if those prepared for the corporation itself are. *Id.*

[315] *Id.* § 16.20(c).

meet the filing requirements of the 1934 Act.[316] Thus, I would recommend the adoption of section 16.20, with a *de minimis* exception allowing corporations with fewer than a specified number of shareholders (perhaps fifty) to waive the mandatory requirement in their bylaws, while retaining the requirement that the same information be provided to any shareholder upon written request.[317] This would eliminate what might be an unnecessary formality in the truly closely-held business, while encouraging frank disclosure from the management of the larger company to its shareholders.[318]

III. Conclusion—Part One

The first part of this article has attempted to expose a variety of areas of the MBCA which are in need of improvement or modification. The second part will undertake a similar goal in the areas of capitalization, organic changes, shareholder litigation, and the problems of the closely-held business.

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[316] *See supra* note 311.

[317] *Cf.* Cal. Corp. Code § 1501(a)(West Supp. 1986)(permitting corporations with fewer than 100 shareholders to waive mandatory requirement).

[318] To be sure, one objection to mandatory disclosure is that management may bear liability for inaccurate information, even to a shareholder who may have no interest in that information in the first instance. *See* Murphy, *supra* note 125, at 135 (discussing alternatives for complete mandatory disclosure). While the possibility of second-guessing is inherent in any disclosure requirement, the RMA, unlike the federal proxy rules, has no express provision dealing with false and misleading statements. In any event, a *de minimis* exception is likely to allay many of these concerns, since most larger companies would be likely to employ an outside accountant, and no certification by management would be required in that instance. *See* Revised Model Business Corp. Act § 16.20(b) (1984). In the smaller corporation, it seems unlikely that a court would impose substantial liability for good faith errors by a corporate official who is not a trained professional accountant. *See id.* official comment (noting different standards which should be applied to professionals and non-professionals under this provision).

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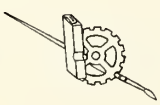

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